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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 108

JOSEPH E. SWANSON ET AL., AS TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 7, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 108

JOSEPH E. SWANSON ET AL., AS TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1935.

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1 Joseph E. Swanson, James Otis and Allen G. Mills, as Trustees of the Lake View Land Association,

Petitioners,

vs:

Commissioner of Internal Revenue,

Respondent.

Docket No. 32572. Appearances

For Taxpayer: Arnold R. Baar, Esq., W. A. Giffen, Esq.;

For Comm'r.: E. A. Tonjes, Esq.,

DOCKET ENTRIES.

1927

Nov. 29—Petition received and filed. Taxpayer notified. (Fee paid)

Nov. 30—Copy of petition served on General Counsel.

1928

Jan. 28—Answer filed by General Counsel.

Jan. 30—Copy of answer served on taxpayer. General Calendar.

Feb. 7—Order that proceeding be p[illegible] on Circuit Calendar for hearing in Chicago, entered.

1929

May 17—Motion to consolidate with docket 41318 filed by taxpayer. 5/31/29 granted.

May 31—Notice of appearance of W. A. Giffen as counsel for taxpayer filed by A. R. Baar.

1932

July 12—Hearing set for week of Sept. 6, 1932 at Chicago, Illinois.

Sept. 7—Hearing had before S. J. McMahon, Div. 16. Submitted on merits. Briefs due in 90 days, 30 days for reply. (Called Sept. 6, 1932.)

Sept. 21—Transcript of hearing of Sept. 7, 1932 filed.

Dec. 3—Motion for extension of 15 days to file brief filed by taxpayer. Granted 12/3/32.

Dec. 6—Memorandum in regard to brief filed by General Counsel.
Dec. 6—Brief filed by General Counsel.
Dec. 20—Motion for extension of 30 days to file brief filed by taxpayer. 12/20/32 granted.

1933

Jan. 26—Brief and requested findings of fact filed by taxpayer. 1/28/33 copy served.

1934

Feb. 26—Memorandum opinion rendered, S. J. McMahon, Div. 16. Decision will be entered for respondent.
Feb. 28—Decision entered Stephen J. McMahon, Div. 16.
May 21—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.
May 21—Proof of service filed by taxpayer.
Jul. 11—Praecipe with proof of service thereon filed.

2 Joseph E. Swanson, James Otis and Allen G. Mills, as Trustees of the Lake View Land Association,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 41318.

Appearances

For Taxpayer: Arnold R. Baar, Esq., W. A. Giffen, Esq.,
For Comm'r.: E. A. Tonjes, Esq.,

DOCKET ENTRIES.

1928

Nov. 5—Petition received and filed. Taxpayer notified. (Fee paid)
Nov. 6—Copy of petition served on General Counsel.

1929

Jan. 5—Answer filed by General Counsel.
Jan. 8—Copy of answer served on taxpayer. General Calendar.

Feb. 5—Order to withdraw from General Calendar and place on Circuit Calendar to be heard in the vicinity of Chicago, entered.

May 17—Motion to consolidate with docket 32572 filed by taxpayer. 5/31/29 granted.

1932

July 12—Hearing set week beginning Sept. 6, 1932 at Chicago, Illinois.

Sep. 7—Hearing had before Mr. McMahon, Div. 16. Submitted on merits. Briefs due in 90 days—30 days for reply. Called 9/6/32.

Sep. 21—Transcript of hearing of Sept. 7, 1932 filed.

Dec. 3—Motion for extension of 15 days to file brief filed by taxpayer. Granted.

Dec. 6—Memorandum in regard to brief filed by General Counsel.

Dec. 6—Brief filed by General Counsel.

Dec. 20—Motion for extension of 30 days to file brief filed by taxpayer. Granted.

1933

Jan. 26—Brief and requested findings of fact filed by taxpayer. 1/28/33 copy served.

1934

Feb. 26—Memorandum opinion rendered, S. J. McMahon, Div. 6. Decision will be entered for respondent.

Feb. 28—Decision entered, Stephen J. McMahon, Div. 16.

May 21—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

May 21—Proof of service filed by taxpayer.

Jul. 11—Praecipe with proof of service thereon filed.

3 UNITED STATES BOARD OF TAX APPEALS.

Joseph E. Swanson, James Otis, and Allen G. Mills, as Trustees of the Lake View Land Association,
Petitioners,
v.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 32572.

PETITION.

Filed Nov. 29, 1927.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:FAR:A1:JDL-60D) dated October 1, 1927, and as a basis of their proceedings allege as follows:

1. The petitioners are the duly qualified and acting trustees of a trust created under declaration of trust, under the laws of the State of Illinois, and its address is c/o Willoughby & Company, 77 W. Washington Street, Chicago, Illinois.

2. The notice of deficiency, a copy of which is attached, was mailed to the taxpayers on October 1, 1927, as the petitioners believe.

3. The taxes in controversy are income taxes for the
4 calendar year 1925. The deficiency asserted is $1,635.27, all of which is in controversy, and the petitioners claim that a refund is due to them.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) Status of Petitioners for Tax Purposes.—In determining the tax liability for the year 1925, the Commissioner has erroneously treated the petitioners, as trustees, as if the trust were an association taxable as a corporation under the provisions of Section 2 (a) (2) of the Revenue Act of 1926 and Article 1502 of Regulations 69. Petitioners allege, however, that the trust does not constitute an association under the statute and that its income is properly taxable as the income of a trust fiduciary, under Section 219 of the Revenue Act of 1926. The income received by the petitioners, being currently distributable, is properly taxable only to the beneficiaries under Section 219 (b) (2) of the Revenue Act of 1926.

(b) Allowance for Depreciation, Including Obsolescence.—In his determination of the amount deductible as a reasonable allowance for depreciation, including obsolescence, of the building owned by the petitioners, the Commissioner has erroneously computed the amount of such a deduction upon the basis of a rate of 4% of cost, whereas a rate of approximately 6% should be used as a reasonable rate for such depreciation, including obsolescence.

5. The facts upon which the petitioners rely are as follows:

(a) Status of Petitioners for Tax Purposes.—Under the declaration of trust, under which the above mentioned trust was organized, and in the activities and practices of the trustees thereunder, the said trust has none of the essential characteristics of an association under the statute and regulations, but is merely a trust estate.

The declaration of trust states that the trust was organized to acquire title to a specified parcel of real estate, to be held under the trust. The activities of the trust have consisted merely of the holding of this property and the collection of the income from the apartment building with which it is improved, and the distribution of the net income among the beneficiaries. The operation of the property is in the hands of agents, as would be the case under any testamentary or other strict trust.

The trustees are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. The beneficiaries have no control over the trust and under the declaration of trust the beneficiaries have no functions or powers except the right to amend the declaration of trust by the agreement of the holders of three-fourths or more in value of the receipts issued to beneficiaries.

The organization of the trust does not in any manner resemble the form or methods used by incorporated bodies. No provision is made for managing officers but all powers are exercised by the three trustees, or, subject to certain limitations, by any two of them. The trustees are not associated together with similar or greater powers than the directors in a corporation nor is the trust organized for the purpose of carrying on any business enterprise.

The net income in the hands of the trustees is required by the declaration of trust to be paid and divided to and among the beneficiaries semi-annually or oftener, in the discretion

of the trustees, and such net income has been currently distributed to the beneficiaries as thus required, (with the exception of a small amount of income of 1925 which was not distributed and was reported as the income of the trust estate).

7 (b) Allowance for Depreciation, Including Obsolescence.—The building owned by the trust is an apartment building of three stories and basement, which was constructed in 1915, and which contains 9 apartments of 7 to 10 rooms each, which are rented to produce the income of the trust. It is located on the corner of Briar Place and Sheridan Road, the latter being one of the principal boulevards in Chicago, and it is only about one block from Lincoln Park, a large city park.

Since the building was constructed there has been a great change in the character of the neighborhood in which it is located, with the result that since 1924 it has been reasonably certain that the valuable life of the building would expire not later than 1938. About 1921 there was constructed only one block away a large twelve story residence hotel. Many other large hotel and apartment buildings have since been constructed in the vicinity, so that in 1925 the neighborhood was typically one of twelve or fourteen story apartment buildings. This means that the value of real estate in this vicinity has advanced so much that only buildings of this large type can produce enough income to allow a reasonable return on the present value of the land.

8 The building in question occupies a particularly desirable and valuable corner. In view of the great increase in the value of the land, it was in 1925 definitely known that a building of this size and character, only three stories high and built in the style of 1915, could not profitably be maintained on this site for more than a limited period and, therefore that this building would have to be removed or destroyed not later than 1938, or thirteen years after that taxable year. Therefore the cost remaining unextinguished on January 1, 1925, should be charged off over the remaining thirteen years of useful life of the building.

At that time, depreciation at the rate of 2% per annum, based on physical life, had been allowable over the preceding ten years of life of the building, amounting to 20%. The unextinguished cost was therefore 80% of the original cost of $125,000. To charge this amount off over the remaining thirteen years requires an annual deduction of approximately

6% of cost, to properly reflect the actually accruing depreciation, ~~including~~ obsolescence.

6. Wherefore the petitioners pray that this Board may hear the proceedings, and redetermine the tax
9 liability of the petitioners, and determine that there is no deficiency due from the petitioners for the year 1925, and determine the amount overassessed and overpaid for that year which should be refunded to the petitioners.

JOSEPH E. SWANSON,
JAMES OTIS, and
ALLEN G. MILLS,
Trustees of
LAKE VIEW LAND ASSOCIATION,
Petitioners.
By ARNOLD R. BAAR- (Signed)
Arnold R. Baar,
Counsel for Petitioners
230 S. Clark Street
Chicago, Illinois.

Of Counsel,
KIXMILLER & BAAR
Chicago, Illinois
Washington, D. C.

10 State of Illinois }
County of Cook } ss

JOSEPH E. SWANSON and ALLEN G. MILLS, being first duly sworn, say that they are duly qualified and acting trustees of Lake View Land Association and as such trustees they are two of the petitioners above named, and that they are duly authorized to verify the foregoing petition on behalf of the petitioners, as trustees of said trust; that they have read the foregoing petition and are familiar with the statements contained therein, and that the facts therein stated are true, except as to those facts stated to be upon information and belief, and those facts they believe to be true.

JOSEPH E. SWANSON (Signed)
Joseph E. Swanson
ALLEN G. MILLS (Signed)
Allen G. Mills

Subscribed and sworn to before me this 28th day of November, A. D. 1927.

R. W. HAYNIE
Notary Public.

11 Form NP-2

TREASURY DEPARTMENT.
Washington

Office of
Commissioner of Internal Revenue

IT:FAR:A1
JDL-60D

Oct 1 1927.

Lake View Land Association,
c/o Willoughby and Company,
77 West Washington Street,
Chicago, Illinois.

Sirs:

The determination of your income tax liability for the calendar year 1923, 1924 and 1925, pursuant to an examination of your books of account and records, as set forth in office letter dated August 30, 1927, discloses an additional tax of $1,635.27 for the year 1925, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: FAR:A1; JDL-60D. In the event that you acquiesce in a part

of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner.

By.....
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882

12 Statement.

IT:FAR:A1
JDL-60D

In re: Lake View Land Association,
c/o Willoughby and Company,
77 West Washington Street,
Chicago, Illinois.

Year.	Deficiency in Tax	Overassessment
1923	None	None
1924	None	None
1925	$1,635.27	

1923

No change.

1924

No change.

1925

Net income reported (Form 1041)	$16,067.52
Deductions:	
Depreciation increased	1,250.00
Net income corrected	$14,817.52

Explanation of Adjustments

Depreciation deducted on valuation of $125,000.00 at 3%	$ 3,750.00
Depreciation allowed on valuation of $125,000.00 at 4%	5,000.00
Depreciation increased	$ 1,250.00

The above adjustment has been made in conformity with Article 161 of Regulations 65.

Computation of Tax.

Net income corrected	$14,817.52
Less: Exemption	2,000.00
Balance taxable at 13%	$12,817.52
Income tax at 13%	$ 1,666.28
Total tax assessable	$ 1,666.28
Tax previously assessed, April 1926, Account #852,421 (Form 1040)	31.01
Deficiency in tax	$ 1,635.27

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

A copy of this communication is being furnished your representative KixMiller and Baar, Attorneys, in accordance with the authority conferred in your power of attorney.

13 UNITED STATES BOARD OF TAX APPEALS.

(Caption—32572)

ANSWER.

Filed Jan 28 1928.

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations in paragraph 1 of the petition.

2. Admits that the notice of deficiency, a copy of which is attached to the petition, was mailed to the taxpayers on October 1, 1927.

3. Admits that the taxes in controversy are income taxes for the calendar year 1925 and that the amount of the deficiency is $1,635.27.

4. (a) Admits that in determining the tax liability for the year 1925 the Commissioner has treated the Lake View Land Association, of which petitioners are trustees, as an association taxable as a corporation under the provisions of Section 2 (a) (2) of the Revenue Act of 1924 and Article 1502

of Regulations 65, but denies that any error was committed in so doing. Denies the remaining allegations set forth in subparagraph (a) of paragraph 4 of the petition.

(b) Admits that in his determination of the amount deductible as a reasonable allowance for depreciation, including
14 obsolescence, the Commissioner has allowed a rate of 4 per cent on the property of the petitioners; but denies that any error was committed in allowing such rate, and denies that any greater rate should be allowed for depreciation, including obsolescence.

5 (a), (b). Denies the allegations set forth in subparagraphs (a) and (b) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the petitioner's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
IRWIN R. BLAISDELL,
Special Attorney, Bureau of Internal Revenue.

HDT—abl
1-27-28

UNITED STATES BOARD OF TAX APPEALS.

Joseph E. Swanson, James Otis, and Allen G. Mills, as Trustees of the Lake View Land Association, *Petitioners,*
vs.
Commissioner of Internal Revenue, *Respondent.*
} Docket No: 41318.

PETITION.

Filed Nov. 5, 1928.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:AR:A—3:DPS—60D), dated September 6, 1928, and as a basis of their proceedings allege as follows:

1. The petitioners are the duly qualified and acting trustees of a trust created under declaration of trust, under the laws of the State of Illinois, and its address is c/o Willoughby & Company, 77 W. Washington Street, Chicago, Illinois.

2. The notice of deficiency, a copy of which is attached, was mailed to the taxpayers on September 6, 1928, as the petitioners believe.

3. The taxes in controversy are income taxes for the calendar year 1926. The deficiency asserted is $1,157.57, all of which is in controversy, and the petitioners claim that a refund is due to them.

16 4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) Status of Petitioners for Tax Purposes.—In determining the tax liability for the year 1926, the Commissioner has erroneously treated the petitioners, as trustees, as if the trust were an association taxable as a corporation under the provisions of Section 2 (a) (2) of the Revenue Act of 1926 and Article 1502 of Regulations 69. Petitioners allege, however, that the trust does not constitute an association under the statute and that its income is properly taxable as the income of a trust fiduciary, under Section 219 of the Revenue Act of 1926. The income received by the petitioners, being currently distributable, is properly taxable only to the beneficiaries under Section 219 (b) (2) of the Revenue Act of 1926.

(b) Allowance for Depreciation, Including Obsolescence.—In his determination of the amount deductible as a reasonable allowance for depreciation, including obsolescence, of the building owned by the petitioners, the Commissioner has erroneously computed the amount of such a deduction upon the basis of a rate of 4% of cost, whereas a rate of approximately 6% should be used as a reasonable rate for such depreciation, including obsolescence.

5. The facts upon which the petitioners rely are as follows:

(a) Status of Petitioners for Tax Purposes.—Under the declaration of trust, under which the above mentioned
17 trust was organized, and in the activities and practices of the trustees thereunder, the said trust has none of the essential characteristics of an association under the statute and regulations, but is merely a trust estate.

The declaration of trust states that the trust was organized to acquire title to a specified parcel of real estate, to be held under the trust. The activities of the trust have consisted merely of the holding of this property and the collection of the income from the apartment building with which it is improved, and the distribution of the net income among the beneficiaries. The operation of the property is in the hands of agents, as would be the case under any testamentary or other strict trust.

The trustees are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. The beneficiaries have no control over the trust and under the declaration of trust the beneficiaries have no functions or powers except the right to amend the declaration of trust by the agreement of the holders of three-fourths or more in value of the receipts issued to beneficiaries.

The organization of the trust does not in any manner resemble the form or methods used by incorporated bodies. No provision is made for managing officers but all powers are exercised by the three trustees, or, subject to certain limitations, by any two of them. The trustees are not associated together with similar or greater powers than the directors in a corporation nor is the trust organized for the purpose of
18 carrying on any business enterprise.

The net income in the hands of the trustees is required by the declaration of trust to be paid and divided to and among the beneficiaries semi-annually or oftener, in the discretion of the trustees, and such net income has been currently distributed to the beneficiaries as thus required, (with

the exception of a small amount of income of 1926 which was not distributed and was reported as the income of the trust estate).

(b) Allowance for Depreciation, Including Obsolescence.—The building owned by the trust is an apartment building of three stories and basement, which was constructed in 1915, and which contains 9 apartments of 7 to 10 rooms each, which are rented to produce the income of the trust. It is located on the corner of Briar Place and Sheridan Road, the latter being one of the principal boulevards in Chicago, and it is only about one block from Lincoln Park, a large city park.

Since the building was constructed there has been a great change in the character of the neighborhood in which it is located, with the result that since 1924 it has been reasonably certain that the valuable life of the building would expire not later than 1938. About 1921 there was constructed only one block away a large twelve story residence hotel. Many other large hotel and apartment buildings have since been constructed in the vicinity, so that in 1925 the neighborhood was typically one of twelve or fourteen story apartment build-
19 ings. This means that the value of real estate in this vicinity has advanced so much that only buildings of this large type can produce enough income to allow a reasonable return on the present value of the land.

The building in question occupies a particularly desirable and valuable corner. In view of the great increase in the value of the land, it was in 1925 definitely known that a building of this size and character, only three stories high and built in the style of 1915, could not profitably be maintained on this site for more than a limited period and therefore that this building would have to be removed or destroyed not later than 1938, or thirteen years after that taxable year. Therefore the cost remaining unextinguished on January 1, 1925, should be charged off over the remaining thirteen years of useful life of the building.

At that time, depreciation at the rate of 2% per annum, based on physical life, had been allowable over the preceding ten years of life of the building, amounting to 20%. The unextinguished cost as of January 1, 1925, was therefore 80% of the original cost of $125,000. To charge this amount off over the remaining thirteen years requires an annual deduction of approximately 6% of cost, to properly reflect the actually accruing depreciation, including obsolescence.

6. Wherefore the petitioners pray that this Board may hear the proceedings, and redetermine the tax liability of the

petitioners, and determine that there is no deficiency due
20 from the petitioners for the year 1926, and determine the amount overassessed and overpaid for that year which should be refunded to the petitioners.

JOSEPH E. SWANSON,
JAMES OTIS, and
ALLEN G. MILLS,
Trustees of
LAKE VIEW LAND ASSOCIATION
Petitioners,

ARNOLD R. BAAR (Signed)
Arnold R. Baar
WILBUR A. GIFFEN (Signed)
Wilbur A. Giffen
Counsel for Petitioners,
230 S. Clark Street,
Chicago, Illinois.

Of Counsel:
KIXMILLER, BAAR & HOFFMAN,
Chicago, Illinois,
Washington, D. C.

21 State of Illinois } ss
County of Cook }

JOSEPH E. SWANSON and ALLEN G. MILLS, being first duly sworn, say that they are duly qualified and acting trustees of Lake View Land Association and as such trustees they are two of the petitioners above named, and that they are duly authorized to verify the foregoing petition on behalf of the petitioners, as trustees of said trust; that they have read the foregoing petition and are familiar with the statements contained therein, and that the facts therein stated are true, except as to those facts stated to be upon information and belief, and those facts they believe to be true.

JOSEPH E. SWANSON (Signed)
Joseph E. Swanson
ALLEN G. MILLS (Signed)
Allen G. Mills

Subscribed and sworn to before me this 2nd day of November, 1928.

R. W. HAYNIE (Signed)
Notary Public.

22 TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to

Sept. 6, 1928

Lake View Land Association,
Joseph E. Swanson, Trustee,
77 West Washington Street,
Chicago, Illinois.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1926 discloses a deficiency of $1,157.57, as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner.
By W. T. SHERWOOD (Signed)
Acting Deputy Commissioner.

Enclosures:
Statement
Form 866
Form 882

23 Statement

IT:AR:A-3
DPS-60D

In re: Lake View Land Association,
Joseph E. Swanson, Trustee,
77 West Washington Street,
Chicago, Illinois.

Year 1926	Deficiency in Tax $1,157.57
Net income reported on Form 1041	$13,074.57
Deduction:	
Additional depreciation	2,500.00
Net income as adjusted	$10,574.57
Less:	
Exemption	2,000.00
Balance subject to tax at 13½%	$ 8,574.57
Tax at 13½%	$ 1,157.57
Tax previously assessed	None
Deficiency in tax	$ 1,157.57

Depreciation has been adjusted in accordance with Article 161, Regulations 69.

The association is held to be a corporation and taxable under the provisions of Section 230 of the Revenue Act of 1926.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—41318) * *

ANSWER.

Filed Jan 5—1929.

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1926. Admits that the proposed deficiency which is in controversy amounts to $1,157.57.

4(a) and (b). Denies that the Commissioner erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a) and (b). Denies the allegations of subparagraphs (a) and (b) of paragraph 5 of the petition.

Denies each and every other allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

(Signed) C. M. CHAREST
C. M. Charest,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
A. H. FAST,
HAROLD D. THOMAS,
Special Attorneys,
Bureau of Internal Revenue.

25 UNITED STATES BOARD OF TAX APPEALS.

(Caption—32572 and 41318)

Arnold R. Baar, Esq., for the petitioners.

E. A. Tonjes, Esq., for the respondent.

MEMORANDUM OPINION.

MCMAHON: These proceedings duly consolidated for hearing are for the redetermination of asserted deficiencies in income taxes as follows:

Docket No.	Year	Amount
32572	1925	$1,635.27
41318	1926	1,157.57

It is alleged that the respondent erred in the determination of the asserted deficiencies (1) in treating the Lake View Land Association as an association taxable as a corporation under the provisions of section 2(a)(2) of the Revenue Act of 1926, and (2) in computing the amount deductible for depreciation and obsolescence of the building held by the petitioners in trust by using the rate of four per cent instead of the rate of approximately six per cent.

The petitioners are the present trustees of the Lake View Land Association created under a trust agreement dated
26 June 1, 1915, entered into by and between Ralph C. Otis and Joseph E. Swanson, both of Chicago, and Allen G. Mills of Glencoe, all in the County of Cook and State of Illinois, for the benefit of Otis and Swanson.

The agreement provides that the contracting parties will acquire title to certain described real estate in the County of Cook and State of Illinois, and the buildings and improvements situated thereon; and that title shall be held by the contracting parties and by their successors in trust as joint-tenants, but not as tenants in common.

The agreement further provides as follows:

> (3) The Trustees shall have exclusive management and control of the real estate above described, and of any and all buildings and improvements so purchased by them or erected upon said real estate or any of the same; they may and shall collect all income, rents and profits of said real estate, buildings and improvements, and may

and shall pay all taxes, assessments and public charges of every kind and nature whatsoever thereon, and shall also pay any and all such costs, charges and expenses of every description connection with or growing out of the execution of the trust by this instrument created as in the exercise of their sole and absolute discretion the Trustees may deem proper or necessary. The Trustees shall also have full power and authority to lease any and all of said real estate, or the buildings or improvements thereon or any part thereof, or any interest in the same, for a term or terms of one hundred and ninety-eight (198) years, or for any shorter or longer period, or for a term or terms beyond the possible termination of this trust, on such terms and conditions as they may deem best; to erect, construct, tear down, alter, reconstruct, rebuild or remodel such buildings or other improvements whatsoever on said real estate or any part thereof as they in their sole discretion shall think best; and to borrow such sums of money as they may deem best, on such terms as they may approve, and to secure the payment of the same by mortgage or trust deed on any or all of said real estate and the buildings and improvements thereon, which power shall be deemed to include power to renew or extend the loan or loans so secured as aforesaid; provided, however, that the aggregate of loans secured by mortgage or trust deed on real estate shall not exceed in amount sixty per cent. (60%) of the value of all real estate and buildings belonging for the time being to the trust estate. The Trustees shall also have power at any time to sell any or all of said real estate or the buildings or improvements thereon, at
27 public or private sale, for cash or on credit, or partly for cash and partly on credit, and on such other terms and conditions as to the Trustees may seem best; and to exchange any or all of said real estate, buildings, or improvements for any other property which the Trustees in their sole discretion may select; and in case there be in their opinion any inequality in value between the value of the property desired so to be exchanged and the value of the property for which it is desired to exchange the same, the Trustees may equalize such inequality by paying or transferring or receiving, as the case may be, money or other property therefor; to grant and acquire easements; to insure and keep insured, in such insurance

companies and to such amounts as the Trustees may determine, the said buildings and improvements against fire, breakage and all other casualties, and themselves as Trustees and the trust estate with respect to accidents, and to pay the premiums therefor; to make any and all repairs which the Trustees may deem necessary or advisable; to hire suitable offices for the transaction of the business of the trust hereby created and pay the rental therefor; to employ all such agents and servants and all such attorneys to law, either from among their own number or otherwise, as the Trustees may deem advisable in connection with the execution of the trust hereby created, and to fix and pay out of the trust estate the compensation of all such agents, servants and attorneys at law employed by the Trustees; to do all such acts, execute all such instruments and papers and expend all such moneys as in their discretion the Trustees may deem proper or advisable in connecttion with the trust hereby created; to settle, adjust, compound or compromise any claim or claims, demand or demands, of any kind or description whatsoever that may at any time be brought or made either against the Trustees as Trustees hereunder or on their behalf as such Trustees against any other person or persons; and also to incur and pay out of the trust estate all such other expenses of every kind and description whatsoever as in the sole discretion of the Trustees shall seem to them necessary or advisable in the proper execution of the trust hereby created.

(4) Each and every sale, mortgage, conveyance, pledge, lease, exchange and all other transactions hereinabove authorized may be made to and with any person or persons, natural or corporate, or any other board of trustees (including corporations and trusts in which the Trustees hereunder or any of the same may be officers or trustees, respectively), on all such terms, agreements and conditions, and by all such forms of conveyance and other instruments, as may in their discretion seem best to the Trustees hereunder.

(5) The Trustees for their services as Trustees hereunder may receive compensation as Trustees (as distinguished from their compensation as agents, servants or attorneys), to be fixed by themselves and paid out of the
28 trust estate, provided, however, that the compensation of

the Trustees as such shall not exceed two and one-half (2½) per cent. of the gross income of said trust.

(6) After making proper provision for the payment of outstanding claims, the net income in the hands of the Trustees shall, semi-annually or oftener, in their discretion, be paid and divided to and among the beneficiaries according to their respective interests hereunder. The Trustees shall upon the request of any beneficiary render a written annual account to the beneficiaries.

(7) Neither the Trustees nor any beneficiary hereunder shall ever be personally liable for any money borrowed or for any debt or liability on account of any mortgage, contract or other instrument or on account of any act done by the Trustees in the exercise of any of the powers hereby conferred upon them or in pursuance of any of the provisions of this agreement, and all persons dealing with the Trustees shall look only to the property of the trust for the payment of their claims, and every lease, mortgage, contract or other instrument, to which the Trustees may be parties or on account of which any debt or liability may be chargeable against the trust estate, shall, in substance, so provide; it being understood, however, that the omission of said provision, through inadvertence, shall not subject the Trustees nor any beneficiary to personal liability. Any person lending or othewise paying any money or transferring any securities or any other property whatsoever other than money to the Trustees shall not be required to see to the application of such money or securities or other property.

(8) The interest of the beneficiaries hereunder as evidenced by the receipts issued by the Trustees shall be held and construed to be personal property, and said receipts or interest shall not be construed or held to be an interest in or evidence of an interest in real estate. The beneficial interests in the net profits, proceeds and avails of this trust shall, in the first instance, be represented by one thousand (1000) shares of the par value of One Hundred Dollars ($100) each, aggregating the sum of One Hundred Thousand Dollars ($100,000) par value. Ralph C. Otis and Joseph E. Swanson shall each be the original owners of five hundred (500) of said shares; and said original owners or their assigns, personal representatives or successors in interest may each receive three hundred seventy-five (375) additional shares of the par value of

One Hundred Dollars ($100.00) each, at any time after an existing insumbrance of Seventy-five Thousand Dollars ($75,000) upon said premises has been paid.

(9) The Trustees shall keep a written register of the names and addresses of all beneficiaries, which names and addresses shall be furnished to the Trustees by the bene-
29 ficiaries, respectively, immediately upon the issuance by the Trustees of receipts to the respective beneficiaries.

Any such interest may be transferred by any beneficiary or by his attorney-in-fact or legal representative, in the following manner, viz.: Any beneficiary, or the attorney-in-fact or legal representative of any beneficiary, who desires to transfer the interest evidenced by this receipt, may in writing request the Trustees to offer said interest for sale to the other beneficiaries. Within ten days after the Trustees shall have received said request, the Trustees shall send by mail a written notice to the other beneficiaries, whose names shall have been registered as aforesaid, at their respective addresses, registered as aforesaid, which said notice shall contain the offer aforesaid and the cash price, to be fixed and determined by the beneficiaries in their sole discretion, at which said interest is offered. Within thirty days from the date of the mailing of said notice, any of said beneficiaries may in writing signify to the Trustees his or their wish to purchase said interest at the price aforesaid, and the said sale shall thereupon be effected by the assignment of the receipt evidencing said interest, by the surrender of the same to the Trustees, and by a notation of such assignment on the books of the Trustees. In case two or more of said other beneficiaries shall in the manner aforesaid signify to the Trustees their wish to purchase said interest at said price, said interest shall be divided among said two or more beneficiaries in proportion to the respective amounts of their receipts, and said sale shall accordingly be effected by the assignment, surrender and notation as aforesaid. If, within the period of thirty days aforesaid, none of said other beneficiaries shall signify their wish to effect such purchase as aforesaid, then said receipt may be thereupon transferred by the holder of such receipt, at the same price as that fixed and determined as aforesaid, to any person or persons, whether theretofore a beneficiary or beneficiaries hereunder or not, which transfer shall be effected by the as-

signment of the receipt evidencing said interest, by the surrender of the same to the Trustees and by a notation of such assignment on the books of the Trustees. The Trustees shall not be under obligation to give the notice above provided with respect to any receipt until after the expiration of ninety days from the date of mailing said notice with respect to any of the other receipts.

Upon the effecting of a transfer in any of the ways above mentioned, a new receipt of receipts shall be issued by the Trustees to the transferee or transferees, who shall thereupon become subject to all of the terms and provisions of this agreement. The issuance of any receipt by the Trustees shall be conclusive evidence of the validity of such receipt, of the interest (which said receipt purports to evidence) of the person or persons in whose name or names the same is issued, and of the fact that the foregoing provisions of this paragraph numbered (9) have been complied with and that such receipt has been duly issued.

The Trustees shall never be liable except to the beneficiaries registered as aforesaid, nor shall the Trustees be liable to any person for issuing any receipt to the transferee named in any transfer or made by the registered beneficiary or by his attorney-in-fact or legal representative, nor shall the Trustees be bound to inquire into the legality or cause of any such transfer. The Trustees shall not be chargeable with any notice of any change in any beneficiary's interest unless such change is made by operation of law or is evidenced by a transfer and sale made in one of the ways above provided.

(10) Any Trustee under this agreement may resign his trust by a written instrument, executed and acknowledged and recorded in the office of the Recorder of Deeds of Cook County, Illinois. Vacancies in the number of the Trustees occuring at any time from any cause shall, within six months after such vacancies, respectively, occur, be filled by the remaining Trustees or by the remaining Trustee, if there be only one, by a written instrument, executed, acknowledged and recorded as aforesaid, designating some other person or persons, as the case may be, as Trustee or Trustees hereunder, and the person or persons so designated shall thereafter have all and the same powers (including all discretionary powers) and all and the same estate (without the necessity of any convey-

ance) as if originally named as Trustee or Trustees herein. Any Trustee may by power of attorney delegate his power hereunder for a period not exceeding one year at any one time to any other Trustee or to the other Trustees hereunder. Excepting the case of filling vacancies as aforesaid, and the case of terminating this trust upon the decision of the Trustees, as provided in paragraph (11) hereof, all powers hereunder (including all discretionary powers) may be exercised and all deeds and other instruments may be executed by any two of the Trustees, provided, however, that no sale of real estate shall be made and no mortgage of real estate shall be made or assumed and no lease for a term exceeding five years shall be made except by all of the Trustees, or by two of the Trustees, one or both of whom shall be acting under a power of attorney from the third Trustee, authorizing him or them to make such sale or to make such mortgage or to make such lease for a term exceeding five years, as the case may be. No Trustee hereunder shall be required to give a bond.

(11) At the expiration of twenty (20) years after the death of the last survivor of the following persons, viz.: James Otis, Ralph Chester Otis and Sarane Otis and Florence Otis, children of Ralph C. Otis aforesaid, and Joseph B, Swanson and Ralph E. Swanson, children of Joseph
31 E. Swanson aforesaid, or at any time before the expiration of the twenty years last aforesaid when all the Trustees, in their discretion, shall decide so to do, the Trustees shall terminate this trust by selling all of the property held by them as such, and (after the satisfaction and discharge of all of the debts and liabilities of the trust estate of every kind and description whatsoever) by dividing the net proceeds of such sale, and any and all other moneys then remaining in the hands of the Trustees, among the registered beneficiaries in proportion to the respective amounts of their interest. Upon the termination of this trust in the manner hereinabove provided, the Trustees shall execute and acknowledge and record in the office of the Recorder of Deeds of Cook County, Illinois, a certificate stating the fact of such termination, which certificate shall be conclusive evidence of all of the facts therein stated, and thereupon this trust shall be deemed fully terminated without any further act or deed on the part of the Trustees or any of them and without any act or deed on the part of any beneficiary.

(12) The Trustees shall be entitled to full and complete indemnity out of the trust estate against any and all liabilities incurred by them as Trustees under this agreement, except only as to such liabilities as shall proximately result from their own wilful misconduct. The discretion of the Trustees, when exercised with respect to any matter or thing in regard to which the exercise of discretion by the Trustees is by any of the provisions of this agreement permitted, shall be final and shall bind all the beneficiaries hereunder and all persons acquiring or having any interest in or under this agreement.

(13) This agreement may be amended by an agreement in writing of the registered beneficiaries holding three quarters or more in value of the receipts issued hereunder, and such agreement shall be absolutely binding upon all of the beneficiaries hereunder and also upon the Trustees; but the right of any third person shall not be affected by any such amendment, nor shall any third person be deemed to have notice thereof, until a certificate setting forth such amendment, executed and acknowledged by the Trustees, shall be recorded in the office of the Recorder of Deeds of Cook County, Illinois, and such certificate shall be conclusive evidence of the validity of the amendment certified to and as to all the facts therein stated.

* * * *

Joseph E. Swanson and Ralph C. Otis were offered by a real estate broker a piece of vacant land at the corner of Briar Place and Sheridan Road, later known as No. 3122 Sheridan Road, in the City of Chicago, Illinois, at a price which they considered very low and they agreed to purchase the property with the view of improving it by erecting
32 an apartment building. Swanson and Otis purchased the property in 1914, Swanson taking title thereto. Originally 135 feet were purchased for $27,000. However, before they started to build, 50 feet thereof were sold for $17,500, so that the remaining property cost them $9,500. Swanson and Otis approved plans and let contracts for the construction of a three-story apartment building containing nine apartments of seven, eight and eleven rooms, respectively. Swanson and Otis secured a mortgage loan from the Central Trust Company of $75,000. Otis and Swanson both contributed equally a total of not over $30,000. The building was completed on May 1, 1914, before the trust agreement was executed.

At the suggestion of their attorney, the trust agreement was executed as a safer way of carrying the title. The Lake View Land Association, therefore, acquired a completed building and the land upon which it stood.

Pursuant to the terms of the trust agreement, Otis and Swanson, each received 500 shares of the par value of $100 each, representing their interest as beneficiaries. The other trustee owns no beneficial interest in the property.

The shares of Swanson and Otis were later transferred as follows:

Oct. 31, 1917 500 shares Otis to Sarene S. Otis (wife)
Jan. 2, 1920 500 shares Swanson to Esther L. Swanson (wife)

Sarane S. Otis and Esther L. Swanson were the owners of all the beneficial interest in the Lake View Land Association in 1925 and 1926. Although Swanson and Otis transferred their beneficial shares to their wives, respectively, then continued as trustees. In about 1926, James Otis, the son of Ralph C. Otis succeeded his father as trustee.

Joseph E. Swanson, in 1915 and until January 1, 1932, was a partner in the partnership known as Willoughby & Company, hereinafter referred to as the "Company," which partnership became a corporation on January 1, 1932. It
33 was engaged in the business of buying and selling real estate as a broker and also managing properties. In 1915, it was acting as manager of not less than 12 properties, other than the Lake View Land Association property. Ralph C. Otis was not a member of the Company, but he officed with the Company, because of his interest in the estate of Joseph E. Otis, for which estate the Company acted as agent.

The Company was engaged as manager of the Lake View Land Association property. It negotiated the original leases, which were at first for terms of from three to five years. In later leases, the term varied. It attended to the redecorating, purchasing of coal, checking and paying of light bills, employing a janitor and attending to all matters relating to service and condition of the building. It kept separate books of account covering the property. It distributed the net income about four times a year.

The affairs of the Lake View Land Association were handled by the Company in the regular routine of its office by its employees. Ralph C. Otis and Swanson directed the management of the property and frequently discussed matters pertaining to the operation of the building. The entire affairs of

the Lake View Land Association were at all times in their hands.

During the entire existence of the Lake View Land Association, the three trustees as such did not assemble in formal meetings. They never adopted resolutions or took other formal action with reference to the affairs of the property. They kept no minute book. They never adopted or had any by-laws or a code of rules. The Lake View Land Association had no officers and no board of directors, except the trustees. The trustees never determined the amounts of income to be distributed. The beneficiaries as such never acted by vote on any matter, nor were any questions submitted to them for their action. The trustees did not address any communication to the beneficiaries.

34 About 1920-1921, the Belmont Hotel, a high class residential apartment hotel about 14 to 16 stories high was constructed about a block from the Lake View Land Association building. The Fullerton Parkway Land Trust Building is a mile south of the building here involved. In 1922, the Barry Building, a 16-story building of the finest type, was constructed alongside of this property. This was the second large building constructed in that section and thereafter about 75 per cent of the boulevard frontage from Briar Place up for about a mile was improved with 13 to 20 story buildings. In 1925, there were five 3-story apartment buildings fronting on the boulevard in that section. About 50 per cent of the improvements were made prior to 1925 and an equal amount since 1925.

The apartments in the building were rented unfurnished, the monthly rental ranging from $135 to $350. In 1915, the rent for a lower 7-room apartment was $135 a month and in 1929 the highest priced apartments rented for $375 a month. The original annual rental was about $21,000. In 1920 the total annual rentals were approximately $22,000 and increased to about $28,000 in 1926, and later to $30,000. Swanson lived in one of the apartments from May 1, 1914 until 1926.

From 1915 to 1925, operating expenses doubled, the coal increasing in price from $4 to $8 and the painting and redecorating from 62 cents an hour to $1.75 an hour.

During 1925, land in the neighborhood of the property involved herein sold for $1,200 a foot. Swanson and Ralph C. Otis had several opportunities to sell the property, being offered as high as $1,500 a front foot for what they had in the years of 1925 to 1929. However, they did not sell. As land

values increased the taxes increased, the taxes for 1930
35 and 1931 being $5,600 for each year. Taxes had increased substantially in 1925 and were assessed with reference to current values.

When the property was purchased, property along Sheridan Road had not been developed to a great extent; there were a few houses here and there. Sheridan Road is a boulevard running along Lake Michigan. The building was constructed to rent at good rates and the rents received in the first years were considered good. In 192[illegible] and 1926, Swanson and Otis considered remodeling the building into 4-room kitchenette apartments but it was deemed too expensive and they determined to operate the property as advantageously as possible until they could improve it with a type of building corresponding with other buildings on the street. However, at sometime, the 11-room corner apartments being difficult to rent were divided into four and six room apartments.

The Lake View Land Association never acquired any real estate other than that heretofore referred to and the trustees have never negotiated for the purchase of any other property. There have been no negotiations for the sale of it. They had many opportunities to sell the property at a large profit but they did not want to sell because they thought they would rather keep it and rebuild or properly improve it themselves. In 1926 Swanson was of the opinion that the real estate market was going to continue to advance. Ewanson had no idea as to the length of time that the building could economically remain on the site. It occurred to Swanson and Ralph C. Otis in 1925 that the building could not be permitted to remain there longer than 1929, in view of the other building operations in that vicinity. They had several "schedules for improvements with a tall building" and probably would have changed the improvements had not conditions changed as they did in 1930. The third trustee was not consulted on the matter.

36 The parties stipulated that the amount of $125,000 is the proper basis for the computation of depreciation and obsolescence.

The respondent, as shown by respective statements attached to deficiency notices, adjusted deduction for depreciation as follows:

Year 1925.

Depreciation deducted on valuation of $125,000 at 3%	$ 3,750.00
Depreciation allowed on valuation of $125,000 at 4%	5,000.00
Depreciation increased	$ 1,250.00

Year 1926.

Net income reported on Form 1041	$13,074.57
Deduction:	
Additional depreciation	2,500.00
Net income as adjusted	$10,574.57

The trust agreement involved in this proceeding and the facts are substantially similar to the agreement and facts in *Joseph E. Swanson, et al., Trustees,* 29 B. T. A. ..... (Docket Nos. 32571 and 41308), promulgated ..... The questions in those proceedings are likewise similar to these in the instant proceeding. Therefore, upon authority of *Joseph E. Swanson, et al., Trustees, supra,* we conclude that the Lake View Land Association is an association within the meaning of section 2(a) (2) of the Revenue Act of 1926, and also approve the action of the respondent with respect to his computation of the allowance for depreciation including obsolescence.

Decision will be entered for the respondent.

Entered Feb 26 1934.

UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 26, 1934, it is

Ordered and Decided: That there is a deficiency of $1,635.27 for the year 1925.

Entered Feb. 28, 1934.

(Signed) STEPHEN J. MCMAHON,
Member.

(Seal)

38 UNITED STATES BOARD OF TAX APPEALS. Decision 41318.

* * * (Caption—41318) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 26, 1934, it is

Ordered and Decided: That there is a deficiency of $1,157.57 for the year 1926.

Entered Feb. 26, 1934.

(Signed) STEPHEN J. McMAHON,
Member.

(Seal)

43 UNITED STATES BOARD OF TAX APPEALS. Notice fil 21, 193

* * (Caption 32572 and 41318) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed May 21, 1934.

To: Robert H. Jackson, Esq.
General Counsel, Bureau of Internal Revenue
Washington, D. C.
Counsel for Commissioner of
Internal Revenue, Respondent.

Please take notice that the above named petitioners, by their undersigned attorney, filed with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., on the twenty-first day of May, 1934, their petition for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision of the Board rendered in each of the above entitled causes. A copy of the petition for review and of the assignments of error as filed with the Board is hereto attached and served upon you.

Respectfully,
ARNOLD R. BAAR (Signed)
Attorney for Petitioners,
11 South La Salle Street,
Chicago, Illinois.

Acknowledgment of Service.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged and having been made on this twenty-first day of May, 1934.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue, Counsel for Commissioner of Internal Revenue.

May 21. 39 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572 and 41318) * *

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Filed May 21, 1934.

To The Honorable Judges of Said Court:

Now come Joseph E. Swanson, James Otis, and Allen G. Mills, as Trustees of the Lake View Land Association, by Arnold R. Baar, their attorney, and petition the United States Circuit Court of Appeals for the Seventh Circuit for a review of the decisions of the United States Board of Tax Appeals rendered and entered on the twenty-eighth day of February, 1934, in Causes numbered 32572 and 41318 on the docket of said Board, wherein they were petitioners and the Commissioner of Internal Revenue was respondent, and in support of their petition respectfully shows this Honorable Court as follows:

40 Venue.

The petitioners are individuals and inhabitants of the judicial circuit of this Honorable Court. The income tax returns of the petitioners as trustees of the Lake View Land Association for the taxable years 1925 and 1926 were filed in the office of the Collector of Internal Revenue for the First District of Illinois, which office is, and was at the time the return was filed, located at Chicago, Illinois, within said judicial circuit.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtues of the laws of the United States.

Jurisdiction.

The Circuit Court of Appeals for the Seventh Circuit has jurisdiction to review the said decision of the United States Board of Tax Appeals by virtue of the Provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926 as amended by Section 603 of, the Revenue Act of 1928 and as further amended by Sections 1101 and 1102 of the Revenue Act of 1932.

Nature of The Controversy.

The controversy between the petitioners and the respondent herein involves the distinction between a trust which is subject to income tax as a fiduciary under Section 219 of the Revenue Acts of 1924 and 1926, and one which is an "association" under Section 2 (a) (2) of the Revenue Acts of 1924 and 1926, and therefore subject to income tax as a corporation under Part III of Title I of said Revenue Acts.

41 Petitioners, as trustees of a single piece of real estate, reported as fiduciaries the trust income for the calendar years 1925 and 1926, showing no income tax due. The Commissioner of Internal Revenue, respondent herein, and the United States Board of Tax Appeals, held that this income was subject to corporation income taxes, which resulted in the determination that there is a deficiency in income tax of $1,635.27 for the year 1925 and of $1,157.57 for the year 1926.

Assignments of Error.

The petitioners say that in the record and proceedings before the United States Board of Tax Appeals, and in the decision and final order of redetermination rendered and entered by said Board in each said cause, manifest error occurred and intervened to the prejudice of the petitioners, and they assign the following errors, and each of them, which they aver, occurred in the said record, proceedings, decision and final order of redetermination, to wit:

(1) The Board erred in not holding and deciding as a

matter of law that the petitioners were taxable as fiduciaries under Section 219 of the Revenue Acts of 1924 and 1926.

(2) The Board erred in holding and deciding as a matter of law that the Lake View Land Association was an association taxable as a corporation for income tax purposes under the Revenue Acts of 1924 and 1926.

(3) The Board erred in that its decision in each cause is contrary to and unsupported by its findings of fact.

(4) The Board erred as a matter of law in not holding and deciding that there is no deficiency in income tax for the years 1925 and 1926.

42 Wherefore, being aggrieved by said holdings and conclusions of law contained in or reflected by the findings and opinion of the Board and by the decision entered pursuant thereto, petitioners pray that the decision of said Board be reviewed and reversed and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected.

ARNOLD R. BAAR,
Arnold R. Baar,
Attorney for Petitioners,
11 South La Salle Street,
Chicago, Illinois.

Verification.

State of Illinois }
County of Cook } ss.

ARNOLD R. BAAR, being first duly sworn, deposes and says that he is counsel of record for the petitioners in the above named cause and as such he is duly authorized to verify said petition; that he has subscribed to the foregoing petition for review; that he has read said petition and is familiar with the statement therein contained; that the statements made are true to the best of his knowledge, information and belief.

ARNOLD R. BAAR.

Subscribed and sworn to before me this day, May 19, 1934.

LORETTA J. GALLAGHER,
Notary Public.

(Seal)

44 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572 and 41318) * *

PRAECIPE FOR RECORD.

Filed Jul 11 1934.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in accordance with the rules of said Court, a single consolidated transcript of the record in each of the above-entitled proceedings, and to include in said transcript of record, the following matters and documents, to-wit:

(1) Docket entries of all proceedings before this Board.
(2) All pleadings filed before the Board.
(3) Findings of fact and opinion by the Board.
(4) Order of redtermination.
(5) Petition for review.
(6) Notice to respondent of filing the petition for review.
(7) Acknowledgment by respondent of service of the notice of filing the petition for review and of a copy of the petition.
(8) This praecipe with acknowledgment by respondent of service thereof.

You are further requested to include only once in said transcript such matters and documents that are common to each proceeding, namely, items 3, 5, 6, 7, and 8 of this praecipe.

ARNOLD R. BAAR,
Attorney for Petitioners.

Acknowledgment of Service and Waiver.

Service of a copy of the foregoing praecipe on the 11th day of July, 1934, is hereby acknowledged. The privilege of filing a counter praecipe is hereby waived.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue,
Attorney for Respondent.

45 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572-41318) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 44, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 16th day of July, 1934.

B. D. GAMBLE,

(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 36, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-second day of August, 1934, upon which the following entitled cause was heard and determined:

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent,

No. 5280, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 13th day of May, A. D. 1935.

FREDERICK G. CAMPELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord one thousand nine hundred and thirty-three, and of our Independence the one hundred and fifty-eighth.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
Petitioners,
5280 *vs.*
Commissioner of Internal Revenue,
Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals.

And afterwards, to-wit: On the twenty-first day of July, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5280. October Term, 1933.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

vs.

Commissioner of Internal Revenue.

The clerk will enter my appearance as counsel for Petitioner.

ARNOLD R. BAAR,
11 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed July 21, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of August, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5280. October Term, 1933.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

vs.

Commissioner of Internal Revenue.

The clerk will enter our appearance as counsel for Respondent.

ROBERT H. JACKSON,
Asst. General Counsel,

RICHARD W. WILSON,
Special Atty., Bureau of Int. Rev.

Endorsed: Filed August 30, 1934. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the City of Chicago, in said Seventh Circuit, on the second day of October, 1934, of the October Term, in the year of our Lord one thousand nine hundred and thirty-four, and of our Independence the one hundred and fifty-ninth.

And afterwards, to-wit: On the twelfth day of November, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5230. October Term, 1934.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

vs.

Commissioner of Internal Revenue.

The clerk will enter our appearance as counsel for Respondent.

FRANK J. WIDEMAN,
Assistant Attorney General,
SEWALL KEY,
A. F. PRESCOTT,
Special Assts. to the Atty. General.

Endorsed: Filed November 12, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eighth day of January, 1935, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 8, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on January 17, 1935.

And afterwards, to-wit: On the twelfth day of January, 1935, there was filed in the office of the clerk of this court, a Motion to Reset Cause for hearing, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Joseph E. Swanson, *et al.*,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} No. 5280.

MOTION.

Comes now the Commissioner of Internal Revenue, respondent herein, by his undersigned attorney, and representing to the Court that counsel for the petitioner is agreeable to the granting of this motion, and moves the Court that the said case be removed from the day calendar of January 17, 1935 for argument, and to reset it for January 18, 1935.

DWIGHT H. GREEN,
United States Attorney, Attorney for Respondent.

Approved:
EVANS,
Judge.

Endorsed: Filed January 12, 1935. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twelfth day of January, 1935 the following further proceedings were had and entered of record, to-wit:

Saturday, January 12, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

On motion of counsel for petitioner, it is now here ordered that this cause be reset for hearing on January 18, 1935.

And afterwards, to-wit: On the eighteenth day of January, 1935, the following further proceedings were had and entered of record, to-wit:

Friday, January 18, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Asspciation,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Arnold R. Baar, counsel for petitioner, and by Mr. A. F. Prescott, counsel for respondent, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the tenth day of April, 1935, there was filed in the office of the clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5280. OCTOBER TERM, 1934, APRIL SESSION, 1935.

JOSEPH E. SWANSON, *et al.*, Trustees of the Lake View Land Association, *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

} Petition for Review of Decisions of the United States Board of Tax Appeals.

April 10, 1935.

Before EVANS, SPARKS, and FITZHENRY, *Circuit Judges.*

FITZHENRY, *Circuit Judge.* This is a petition for review of decisions of the United States Board of Tax Appeals affirming the decision of the Commissioner of Internal Revenue that deficiencies of income tax were due from the Lake View Land Association. The Board found that the case is substantially the same as that of *Joseph E. Swanson, et al, Trustees of the Fullerton Parkway Land Trust*, 29 B. T. A. 1123, and is governed by the decision in that case. The only issue on this review is whether the income of the Lake View Land Association for the years 1925 and 1926 is subject to tax as the income of a trust under Section 219 of the Revenue Act of 1926 or as an "association" under Section 2 (a) (2) of that Act.

Joseph E. Swanson and Ralph C. Otis were the owners of a three-story apartment building containing nine apartments. On June 1, 1915, they entered into a trust agreement for the

purpose of carrying the title to the real estate. The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. In 1926, James Otis succeeded his father as trustee.

Under the trust agreement, the trustees were given the complete management and control of the property, to exchange, reconstruct, remodel, sell or improve at their discretion or to borrow money secured by the property. They were authorized to rent suitable quarters for the transaction of the business of the trust and employ such assistants as they required. The agreement provided for the issuance of "receipts" to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued; that neither the trustees nor the beneficiaries should be personally liable and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expiration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary.

The case differs from that of Joseph E. Swanson, *et al*, Trustees of the Fullerton Parkway Land Trust in that the Lake View Land Association acquired a complete building, whereas, the Fullerton Parkway Land Trust purchased a piece of vacant property and erected the building upon it.

The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the affairs of the property, kept no minute book, had no by-laws. They elected no officers and no so-called board of directors.

From the above analysis of the agreement which created Lake View Land Association, the conclusion is inescapable that it was a corporation in everything but the name and seal and the fact that its business was carried on without holding formal meetings, adopting resolutions, and keeping minutes. A group cannot organize and carry on business and escape taxation as a corporation on so slight a distinction.

In *Tyson* (*Chicago Real Estate Trust*) v. *Commissioner*, 68 F. (2d) 584, 587, this Court said:

> "That the organization of the trustees was of a very loose and informal character we think is not sufficient to take them out of the classification contemplated by the administrative regulations cited. Even though no formal meetings of the trustees were held, they had adopted a regular practice for the administration of their trust. * * *. It is true that neither the trustees nor the receipt holders ever drew up a code of rules or by-laws for the government of the trust, but such action seems entirely unnecessary in view of the comprehensive nature of the trust agreement under which they were organized in the first place. We think these facts are sufficient to warrant our classifying petitioners as a quasi-corporate organization in form and procedure and as such taxable as a corporation."

Petitioners contend that they were not carrying on a business enterprise but were merely serving to hold the title to the real estate. It is true that the active management of the property seems to have been left to Joseph E. Swanson, one of the trustees who was also a member of a real estate firm known as Willoughby & Company. Ralph C. Otis had his office in the same building and frequently consulted with Swanson in regard to the management of the trust property. The question therefore resolves itself into this: Can the trustees avoid the conclusion that they are carrying on a business enterprise by turning the management of their affairs over to one of their number as a partner in another enterprise which handles the affairs of the association with the advice of the other trustees? We believe the answer to be that the trustees in this case were an association carrying on a business enterprise, personally and through their agents and employees.

AFFIRMED.

Endorsed: Filed April 10, 1935. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the tenth day of April, 1935, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 10, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the decisions entered in this cause on February 28, 1934, by the United States Board of Tax Appeals be, and the same are hereby affirmed.

And afterwards, to-wit: On the sixth day of May, 1935, there was filed in the office of the clerk of this court, a Praecipe for record, which said Praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Joseph E. Swanson, *et al.*, as Trustees of the Lake View Land Association,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} No. 5280.

PRAECIPE FOR RECORD.

To the Clerk of the Circuit Court of Appeals for the Seventh Circuit:

You are hereby requested to prepare and certify to the Supreme Court of the United States, on application for certiorari, a transcript of the record in the above-entitled cause, including therein, *inter alia*, the following:

(1) The complete printed transcript of the record in said cause.

(2) The opinion of the Court.

(3) The order affirming the decision under review.

(4) All other appropriate orders and proceedings, not including orders extending time for briefs and not including briefs of parties.

(5) This praecipe.

ARNOLD R. BAAR,
Counsel for Petitioners.

Endorsed: Filed May 6, 1935. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 39 to 48, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Praecipe file on the sixth day of May, 1935, in the case of

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent,

No. 5280, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 13th day of May, A. D. 1935.

FREDERICK G. CAMPELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following Nos. 78 and 79.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7086-C)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. .....

JOSEPH E. SWANSON, et al., As Trustees of the LAKE VIEW LAND ASSOCIATION,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

ARNOLD R. BAAR,
Attorney for Petitioners.

KIX MILLER, BAAR & HOFFMAN,
11 South La Salle Street,
Chicago, Illinois.

CHICAGO LAW PRINTING CO., 111 NORTH WACKER DRIVE (COR. WASHINGTON ST.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. .....

JOSEPH E. SWANSON, ET AL., AS TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered on April 10, 1935 (R. 47), affirming the judgment of the United States Board of Tax Appeals in the case entitled as above, being No. 5280 in said Court.

QUESTION PRESENTED

This case involves the distinction between a trust which is subject to income tax as a fiduciary, under Section 219

of the Revenue Act of 1926, and one which is an "association" under Section 2 (a) (2) of the Revenue Act of 1926 and is therefore subject to income tax as a corporation.

The specific question is whether two owners of a three-story apartment building, in which one of them lived, who transferred title to themselves and another as trustees, created an "association," which is taxable as a corporation, where the building was managed by one of the owners, as a partner of the real estate management firm which was employed as the agent for the trustees, in consultation with the other owner. During the taxable years here involved, the beneficial owners were the wives of the original owners.

Reasons for Granting This Petition

(1) An important Federal question has been decided in this case contrary to the applicable decisions of the Supreme Court. The Circuit Court of Appeals for the Seventh Circuit has given to the statutory term "association," a construction substantially at variance with that established by this Court in:

Hecht v. *Malley*, 265 U. S. 144.

Burk-Waggoner Oil Association v. *Hopkins*, 269 U. S. 110.

(2) This decision of the Circuit Court of Appeals for the Seventh Circuit is in direct conflict with the decisions of the Circuit Courts of Appeals for several other Circuits, holding that trusts were not taxable as associations, in the following cases:

Coleman-Gilbert Associates v. *Commissioner*, First Circuit, February 27, 1935, 76 Fed. (2d)

191, reversing the Board of Tax Appeals. Petition for certiorari filed in this Court, May 27, 1935, Nos. 1003, 1004. Some twenty apartment houses were operated by the trustees.

Commissioner v. *Kelley,* First Circuit, December 1, 1934, 74 Fed. (2d) 71, affirming Board of Tax Appeals. Trustees conducted an active manufacturing business under the name of Union Paste Co.

Commissioner v. Guitar Trust Estate, Fifth Circuit, August 24, 1934, 72 Fed. (2d) 544, reversing Board of Tax Appeals on other grounds but sustaining its holding that a trust managing large tracts of real estate and much personal property and carrying on a ranching business, a cotton business, and a cotton seed business, was not taxable as an association.

Commissioner v. *Combs,* Ninth Circuit, April 11, 1935, ... Fed. (2d) ....., affirming the Board of Tax Appeals. The trust was created to develop an oil lease and operated the well for about two years.

Commissioner v. *Brouillard,* Tenth Circuit, April 4, 1934, 70 Fed. (2d) 154, certiorari denied under title of *Helvering* v. *Pryor & Lockhart Development Co.,* October 8, 1934, ... U. S. ....., affirming the decisions of the Board of Tax Appeals. Three oil development syndicate trusts.

(3) In the Seventh Circuit alone, several decisions of the Circuit Court of Appeals upon the same question are in irreconcilable conflict, and demonstrate that no consist-

ent rule is being applied by that Court. These decisions are:

I. Trusts Held Not To Be Associations.

Tyson, et al., *Trustees of Zenith Real Estate Trust* v. *Commissioner*, December 9, 1931, 54 Fed. (2d) 29, reversing Board of Tax Appeals. Trustees holding net lease of business property.

Commissioner v. *Morriss Realty Co. Trust*, January 2, 1934, 68 Fed. (2d) 648, affirming Board of Tax Appeals. A family real estate trust, which subdivided tracts of land, including some which it purchased, sold lots on installments, erected houses and sold them on time contracts, and borrowed money on mortgages for such operations.

Commissioner v. *McCormick, et al.*, January 24, 1934, 68 Fed. (2d) 653, affirming Board of Tax Appeals. Trustees owning a large office building, operated by a managing agent.

Commissioner v. *Duckwitz*, Feb. 9, 1934, 68 Fed. (2d) 629, affirming Board of Tax Appeals. Trust organized to obtain capital for development of oil wells, procured the drilling of three wells, operated them, and then sold the property.

II. Trusts Held To Be Associations.

Tyson, et al., *Trustees of Chicago Real Estate Trust* v. *Commissioner*, December 15, 1933, 68 Fed. (2d) 584, certiorari denied June 4, 1934, 292 U. S. 657, affirming Board of Tax Appeals.

Trustees holding three office building properties under net leases, having previously owned and sold other properties.

Reinecke v. *Kaempfer*, et al., June 26, 193[illegible] 72 Fed. (2d) 469, certiorari denied Jan. 21, 1935, ... U. S. ....., reversing District Court. Family trust, operating bird store.

(4) The question involved is of great general interest, affecting a large number of taxpayers and involving large amounts of taxes. The controlling rule originally announced by this Court has been applied by the Circuit Courts of Appeal with inconsistency and contradiction. In their own opinions, these Courts declare that there is no controlling rule, and that it is difficult for them to discover the standards which they are to apply. This creates an intolerable condition of uncertainty, with the result that an unduly large proportion of the decisions of the Board of Tax Appeals upon this question are appealed. Many of such cases are now pending before the Circuit Courts of Appeals. There results also a condition of intolerable inequality, in that two taxpayers, similarly situated, are subjected to different liabilities, because one lives in a circuit where the rule, or, rather, the unexpressed attitude, is favorable, while the other lives in a circuit where the attitude is unfavorable.

Certiorari was granted by this court on May 13, 1935, in the case of *Morrissey* v. *Commissioner*, Dkt. No. 834, and petition for certiorari has been filed on May 27, 1935, in the case of *Helvering* v. *Coleman-Gilbert Associates*, Dkt. Nos. 1003, 1004, by the Solicitor General of the United States. These cases involve the same question as the present case.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

ARNOLD R. BAAR,
Attorney for Petitioners.

Chicago, Illinois, May 29, 1935.

BRIEF.

(1) The Decision In This Case Is In Conflict With The Controlling Decisions of This Court.

The opinion of the Circuit Court of Appeals for the Seventh Circuit in this case shows that the Court has departed widely from the rule announced many years ago by this Court. In holding that the Lake View Land Association was taxable as a corporation, the Court has given to the statutory term "association" a construction substantially at variance from that prescribed by the Supreme Court in the following cases.

In *Hecht* v. *Malley*, 265 U. S. 144, 157, this Court said that the word "association" signifies—

> "* * * a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise."

And further—

> "* * * a body of persons organized for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation."

In *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110, 113, 114, this Court has also pointed out that associations were properly subject to the taxes imposed upon corporations because of their practice to "manage their affairs by a board of directors and executive officers and conduct their business in the general form and mode of

procedure of a corporation," and "because of this resemblance in form and effectiveness to the ordinary business corporation."

It was pointed out by the Supreme Court in *Hecht* v. *Malley*, 265 U. S. 144, not only that the Massachusetts trusts there involved employed many corporate forms and methods of procedure, but in addition that, under the Massachusetts statutes, they were classified as "associations" and were subject to suit, attachment and execution as if they were corporations. The opinion states, at page 147:

> "The Massachusetts statutes, however, recognize their existence, and impose upon them, as associations,' certain obligations and liabilities.[4]
>
> "[Footnote to opinion:] '[4] By Chapter 441 of the Acts of 1909, the trustees of 'a voluntary association' under a written instrument or declaration of trust the beneficial interest of which is divided into transferable certificates of participation or shares' are required to file copies of the instrument of trust with designated public officers; and by chapter 184 of the Acts of 1916, such associations may be sued for debts, obligations, or liabilities, and their property may be subjected to attachment and execution as if they were corporations. See 2 General Laws 1921, chap. 182."

Again, at page 161, the Court said:

> "* * * We do not believe that it was intended that organizations of this character—described as 'associations' by the Massachusetts statutes and subject to duties and liabilities as such—should be exempt from the excise tax on the privilege of carrying on their business * * *."

The specific emphasis upon this element of the case, as well as the general language of the opinion, clearly indicates that the Supreme Court would not have held those

trusts taxable as corporations in the absence of their substantial resemblance to corporations. This position was later restated unequivocally in *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110, as quoted above. As disclosed by the opinion in the present case, as well as by its other decisions upon the same question, the Circuit Court of Appeals for the Seventh Circuit has completely departed from the rule thus established by the Supreme Court.

In the opinion below, there is no attempt to specify those corporate forms and methods of procedure which were employed by this trust. The Court does make the general statement that this trust was "a corporation in everything but the name and seal and the fact that its business was carried on without holding formal meetings, adopting resolutions, and keeping minutes." The preceding statement of facts by the Court, however, fails to disclose even one essential corporate characteristic which was present in this case. On the contrary, it shows that in many respects there was not the slightest resemblance to the methods and forms and modes of procedure used by corporations, and that the methods and forms and modes of procedure were those traditionally employed by trusts and trustees. The opinion does not point out a single feature in which this trust was not a typical real estate holding trust. For convenience, the Court's statement of the facts is here reprinted in full (the footnotes having been supplied).

> "Joseph E. Swanson and Ralph C. Otis were the owners of a three-story apartment building containing nine apartments. On June 1, 1915, they entered into a trust agreement for the purpose of carrying the title to the real estate. The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. In 1926, James Otis succeeded his father as trustee.
>
> "Under the trust agreement, the trustees were given the complete management and control of the property,

to exchange, reconstruct, remodel, sell or improve at their discretion or to borrow money secured by the property. They were authorized to rent suitable quarters for the transaction of the business of the trust and employ such assistants as they required. The agreement provided for the issuance of 'receipts' to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued;* that neither the trustees nor the beneficiaries should be personally liable** and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expiration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary. * * *

"The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the

---

* This must imply that the trustees could sue and be sued *as individuals*, and not the trust as an entity, as that would not be sanctioned by the law of Illinois. *Wahl* v. *Schmidt*, 307 Ill. 331, 138 N. E. 604.

** This provision would be without legal effect in Illinois, in that the trustees would nevertheless remain personally liable, with a claim for reimbursement from the trust estate. *Austin* v. *Parker*, 317 Ill. 348, 148 N. E. 19.

affairs of the property, kept no minute book, had no by-laws. They elected no officers and had no so-called board of directors."

The Court quotes from its prior decision in the case of *Tyson*, et al., *Trustees of Chicago Real Estate Trust* v. *Commissioner*, 68 Fed. (2d) 584, certiorari denied 292 U. S. 657, to the effect that a trust is a quasi-corporate organization in form and procedure, and as such is taxable as a corporation, notwithstanding that its organization is of a very loose and informal character. In this present case, however, the Court does not make even the pretext which it did in the Tyson case, of showing wherein the organization or operation of this trust resembled to any degree those which are characteristic of corporations. Moreover, the complete opinion in the Tyson case itself will demonstrate that the Court there rested its decision upon three grounds, of which the first was controlling, which the Court stated as follows:

(1) "We therefore conclude that the trustees were engaged in sufficient activities to warrant our holding that they were carrying on a business enterprise, hence taxable as an association."

(2) "An entity * * *, in order to bring itself within the definition of a trust for taxing purposes, must be practically self-operating, 'without care or supervision.'"

(3) "We think that these facts are sufficient to warrant our classifying petitioners as a quasi-corporate organization in form and procedure and as such, taxable as a corporation."

In the present opinion, the ground of decision would seem to be most definitely expressed in the following statements:

"The question therefore resolves itself into this: Can the trustees avoid the conclusion that they are

> carrying on a business enterprise by turning the management of their affairs over to one of their number as a partner in another enterprise which handles the affairs of the association with the advice of the other trustees? We believe the answer to be that the trustees in this case were an association carrying on a business enterprise, personally and through their agents and employees."

The conduct of a business, or the business character of the trust activities, was not even mentioned by the Supreme Court in the definitions above quoted, which refer only to "the prosecution of some common enterprise" and "the prosecution of some purpose." The rule has been correctly stated by the Circuit Court of Appeals for the Tenth Circuit in *Commissioner* v. *Brouillard*, 70 Fed. (2d) 154, as follows:

> "The fact that a group associate themselves together for the purpose of engaging in business for profit does not necessarily mean that they must be taxed as an association. That is not the decisive consideration."

The Circuit Court of Appeals for the First Circuit has also expressed the correct rule, in *Coleman-Gilbert Associates* v. *Commissioner*, Feb. 27, 1935, 76 Fed. (2d) 191, as follows:

> "We think, however, it is generally agreed that, in order for a trust to be taxed as a corporation, the trustees must not only be carrying on a business enterprise for profit, but must be doing it in much the same manner and form as directors of a corporation."

This "general agreement" has been ignored by the Circuit Court of Appeals for the Seventh Circuit, in holding in this case that this trust was taxable as a corporation in

the complete absence of the use of corporate methods and forms, as required by the rule established by the Supreme Court.

(2) This Decision Is In Conflict With Those Rendered in Four Other Circuits.

The facts of this case and the grounds of decision assigned by the Court have been set forth under the preceding point. With these in mind, a brief analysis of the most recent decisions in the four other Circuits and merely a slight examination of the rules of decision as stated in their opinions will disclose unmistakable and irreconcilable conflict.

Coleman-Gilbert Associates v. *Commissioner,* Feb. 27, 1935, 76 Fed (2d) 191, is a case in which the Circuit Court of Appeals for the First Circuit reversed the decision of the Board of Tax Appeals and held that no "association" existed. On behalf of the Commissioner, a petition for certiorari has been filed in this Court on May 27, 1935, Dkt. Nos. 1003, 1004, which alleges that the decision there rendered "is in substantial conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit" in the present case.

After having operated a number of jointly owned apartment houses for more than twenty years, three men and their wives created a trust which, during the taxable years involved, owned and operated "some twenty apartment houses," producing gross rentals of approximately $420,000.00 per year from about 1500 tenants. All of the interested parties were trustees. Two of them devoted their entire time to the management and operation of the trust properties and a third was "also actively engaged in taking care of a part of the management duties," but the two

wives were entirely inactive. No agents, excluding strictly supervised employees, were employed. The Court said:

> "From the decisions of the Board of Tax Appeals and the several Circuit Courts of Appeals, it is impossible to mark out any definite pathway to follow in every case. The only conclusion is that each case must depend on its own state of facts.
>
> "We think, however, it is generally agreed that, in order for a trust to be taxed as a corporation, the trustees must not only be carrying on a business enterprise for profit, but must be doing it in much the same manner and form as directors of a corporation. • • •
>
> "It is true that the Board of Tax Appeals found as facts that, while the trustees in the instant cases did not exercise all the powers given them in the trust instrument, they were, nevertheless, carrying on a business for profit in much the same manner as directors of a corporation are associated together with the purpose of carrying on a business enterprise; and upon these facts, judged by their activities, the Coleman-Gilbert Associates was an association within the meaning of Sec. 2 (2) (a) (2) of the 1926 Act, and 701 (a) (2) of the 1928 Act. • • •
>
> "From the activities of the trustees alone we do not think the Board was warranted in holding as a matter of law that the trust was an association. While there may have been sufficient evidence to warrant the Board in finding that they were conducting a business enterprise, and with the purpose of ensuring an income for the beneficiaries during the continuance of the trust, and while they may have exercised powers in some respects as great as those of the directors of a corporation, they did not exercise them in the manner of directors of a corporation. They held no meetings; they kept no records; their acts were not determined by a majority vote. Their tenure as trustees was during life or the duration of the trust, unless they voluntarily resigned. Two trustees were

wholly inactive, and a third only active in part in the management. They conducted the business in the same manner that it had been conducted before the trust was formed. * * *

"The uncontradicted evidence in these cases discloses, we think, that the Coleman-Gilbert Association was not organized to conduct a business for profit; that while the trustee did manage the property so that it produced an income for the beneficiaries, it was only incidental to the main purpose for which the trust was created. The purpose of the creators, according to the uncontradicted evidence, was to prevent a partition and division of the property in case one of the owners died within a definite period of time. * * *

"If every trust terminating in five, ten or fifteen years, in which the trust res consisted of rentable real estate is managed faithfully and prudently by the trustees with a view to producing the largest income for the *cestuis qui trustent*, is to be taxed as an association, few strictly pure trusts would escape a double taxation upon its income.

"The imposition of a double tax upon the income of a trust viz.: a tax, first, on the income of the trust as an entity, and a further tax upon the distributive shares of the beneficiaries, should clearly be warranted under the Acts of Congress, and should not have as its basis some remote resemblance to a corporation. If there is doubt, it should be resolved in favor of the taxpayer. * * *

"The conclusion which the Board drew from the stipulated facts and the uncontradicted evidence that Coleman-Gilbert Associates was an association within the meaning of the Revenue Acts of 1926 and 1928, we think, was error."

The application of these principles to the case of the Lake View Land Association would clearly require a different result. There is therefore a definite conflict between

the decisions in the First and Seventh Circuits, as recognized by the Solicitor General in his petition for certiorari in the above case. The present decision should therefore be reviewed by this Court as herein urged.

In another case before the same Court, *Commissioner* v. *Kelley*, December 1, 1934, 74 Fed. (2d) 71, affirming the Board of Tax Appeals, the Circuit Court of Appeals for the First Circuit reached a similar result upon similar grounds. It was there held that trustees conducting an active manufacturing business under the name of Union Paste Co. were not taxable as an association, for reasons stated as follows:

> "While the powers of the trustees under the declaration of trust were broad and the form of organization authorized in the declaration of trust was similar in many respects to that of a corporation, the trustees never exercised these powers. • • •
>
> "While the trust here involved can be said to be an organized body without a charter, the main issue, as we view it, is not whether they conducted a business and for profit, but whether they conducted such business from 1925 to 1930 'upon the methods and forms used by incorporated bodies,' or as an organization 'having the general form and mode of procedure of a corporation.' • • •
>
> "In the first place it is admitted that the sole purpose in organizing the trust was a temporary one, viz.: to bring to a conclusive binding determination the interest of Helen W. Kelley in the income of the enterprise. The government seeks to distinguish between motive and purpose; but while the motive for the creation of this trust was the demand of Helen W. Kelley for an accounting, the purpose of creating the trust is admitted to have been to secure a conclusive, binding determination of her interest, and, incidentally, during the pending litigation, to conduct the business along the same lines as under the partnership, with the trustees having full control.

> "To constitute a trust an association and taxable as a corporation, there must be a body of persons associated together who are (1) actually carrying on business for profit, and (2) under the usual forms and procedure of corporations. Both conditions must be present."

In *Commissioner* v. *Guitar Trust Estate*, August 24, 1934, 72 Fed. (2d) 544, the Circuit Court of Appeals for the Fifth Circuit reversed the decision of the Board of Tax Appeals upon other grounds but sustained its decision that the trust was not taxable as an association, under the following circumstances. A husband and wife transferred substantially all their property to the husband and two of his sons, as trustees for the benefit of the grantors and their eight children. The property consisted of large tracts of Texas real estate and much personal property, including a ranching business, a cotton business, and a cotton seed business, all of which were conducted by the trustees. No certificates of beneficial interest were provided for or issued. The beneficiaries, other than the three trustees, took no part in the affairs of the trust. The Court said:

> "Except that the trustees were authorized to continue the going business, the trust had no feature in common with a corporation. The very purpose of creating a trust is to have the property administered by trustees for the beneficiaries. It is not unusual that this should include the conduct of a going business. The case comes under our decision in *Blair* v. *Wilson Syndicate Trust* (C. C. A.), 39 F. (2d) 43. We agree with the Board that the Guitar Trust Estate was not an association."

This shows that in the Fifth Circuit, as in the First, the rules being applied and the results being obtained are in conflict with those in the Seventh Circuit. The same is

true in the Ninth and Tenth Circuits, as shown by the following cases.

In *Commissioner* v. *Combs, et al.*, April 11, 1935, ... Fed. (2d) ....., the Circuit Court of Appeals for the Ninth Circuit, affirming the Board of Tax Appeals, held that there was no "association" where two men, in order to raise funds for the development of an oil lease, created a trust and sold shares of beneficial interest therein representing 25% of the production of the oil well. After developing and operating the well for two years, the trust was terminated by sale of the property. The Court said:

> "Inasmuch as the purpose of the act is to treat associations, corporations, joint stock companies and insurance companies on a basis distinct and separate from that applicable to trusts or copartnerships, it is clear that while a trust may be organized so that the trustees can do business, their powers, duties, obligations and methods of doing business and the relationship of the trustees to the beneficiaries, must in some degree correspond to the similiar duties and obligations of directors and stockholders of a corporation in order to make the trust taxable as an association. * * *. As we understand the respondents they do not question that the trust herein was doing business, but they contend that they do not meet the second test. * * *
>
> "The trust agreement gave the two trustees large powers over the property of the trust similar to those of a board of directors of a corporation, but they had no seal, no principal place of business. There was no provision in the trust agreement for meetings of the trustees or the beneficiaries. The latter had no control over the trustees and no participation in the selection of the trustees or their successors. * * *
>
> "The respondent points out that the trust agreement made no provision for the election of trustees annually or otherwise. Upon the death, resignation

or refusal of one to act, the other was authorized to act alone. There were no corporate officers, no by-laws, nor corporate or association name. While the question involved is a close one not free from difficulty we conclude that the Board of Tax Appeals was right in holding that the organization was not an association within the meaning of the Revenue Act but rather that it was a trust, taxable as such."

In *Commissioner* v. *Brouillard*, April 4, 1934, 70 Fed. (2d) 154, certiorari denied October 8, 1934, under title of *Helvering* v. *Pryor & Lockhart Development Company*, ... U. S. ....., affirming the Board of Tax Appeals, the Circuit Court of Appeals for the Tenth Circuit held that three oil development enterprises, which engaged in substantial and varied activities, were taxable as trusts and not as associations. In its opinion, the Court said:

"Where an entity of this kind resembles a corporation in some respects and that of a partnership in others—that frequently being the case—the features of similarity should be compared and the marks of dissimilarity contrasted. The resemblances should be balanced. It should be determined by that method the one to which the enterprise is predominantly akin in the method, mode and form of procedure in the conduct of its business. If it be a corporation, it falls within that category; if a partnership, it should be placed in that class and should be taxed accordingly.

"The fact that a group associate themselves together for the purpose of engaging in business for profit does not necessarily mean that they must be taxed as an association. That is not the decisive consideration. * * * It is persuasive that Congress intended to tax as a corporation only partnerships conducting their business after the method and form of a corporation, with the economic advantage therefrom, regardless of whether the business is conducted for profit. * * * The facts just canvassed demonstrate

that the method, mode and procedure of each of these entities in the conduct of its business was strikingly different and substantially dissimilar from that usually employed by a corporation. The system and course of procedure approximate much more closely that of an ordinary partnership among personal friends reposing full confidence in each other. The resemblances predominate strongly in favor of a trust. Consequently, the entities should have been taxed as trusts, not associations."

The significant characteristics of the three enterprises before the Court in the *Brouillard* case may be briefly stated as follows:

Iowa-Burk Syndicate.—About 110 persons contributed a capital of $30,000.00 to a trust, organized under a written instrument, for the development of oil wells upon property covered by a lease in which a one-half interest was transferred to the trustees. Certificates of interest were issued, as provided in the trust agreement, but not to all of the contributors. Under the authority of the trust agreement, the trustees, chiefly through one who acted as a manager, procured the drilling of three wells, borrowed money for that purpose, operated the wells for a few months, and then sold the property. No officers were elected and no formal meetings of trustees or beneficiaries were held, except that the beneficiaries were called together to determine whether the lease should be sold, and the attorney for the purchaser required the approval of all members of the Syndicate for the sale. The provision of the trust agreement, that the beneficiaries should meet to elect new trustees as soon as the capital of $30,000.00 had been raised, was not acted upon.

Shepherd Syndicate.—An interest in an oil and gas lease, one-half of which was owned by a corporation, was trans-

ferred to trustees with authority to manage and develop the property. About ten persons subscribed to the capital of the trust, which, however, they did not contribute but which was merely charged against them and deducted from their shares of the income. The corporation which owned the one-half interest in the lease drilled wells, pumped and sold oil, and furnished to the trustees monthly statements for their half of the expenses and income. The duties of the trustees consisted of checking the statement, paying expenses, and distributing dividends to the beneficiaries. One of the trustees acted as manager.

Pryor and Lockhart Development Company.—An oil and gas lease was assigned to a single trustee, acting under a trust agreement. About fifteen persons contributed capital. The trustee procured the drilling of six oil wells on the trust property by an agreement with drilling contractors, and also arranged for the drilling of two wells by the same contractors upon the property of two other owners. The oil produced from the trust property was sold to two corporations, who made payment semi-monthly to the trustee. After paying current expenses, the trustee distributed the net income among the beneficiaries, using the employees of a partnership of which he was a member. The trustee also employed a superintendent and pumper. There were no meetings of the beneficiaries and no attempt by the beneficiaries to control the funds. The trust had no directors nor officers.

The enterprises under consideration by the Circuit Court of Appeals for the Tenth Circuit in the *Brouillard* case, employed modes and procedures and form of organization which were certainly no less similar to those characteristic of incorporated bodies than those presented in this case. Activities carried on by those syndicates were much more

extensive and much more equivalent to the conduct of a business than those of the Lake View Land Association.

Consequently, the decision here under review is clearly in conflict with that of the Circuit Court of Appeals of the Tenth Circuit, as well as wholly irreconcilable with the principles stated in the opinion of that Court, as quoted above. There is a similar conflict with the decisions and opinions of the Circuit Courts of Appeals in the First, Fifth, and Ninth Circuits, as well as in the Tenth. The Supreme Court should therefore grant this petition for certiorari.

(3) In the Seventh Circuit Itself, No Consistent Rule Is Being Applied.

Recognizing that this Court is now concerned only with the instant case, and not with any errors which may have been committed in prior cases, it still seems that the result in the present case can be adequately comprehended only in the light of the prior decisions of the same Court on the same question. It is submitted that the inconsistencies and contradictions shown by the opinions and decisions in those cases will demonstrate that the Circuit Court of Appeals for the Seventh Circuit has been applying to this question a wholly erroneous conception of the governing rule of law. The natural result is the erroneous decision in this case.

We submit that there is no proper ground of distinction between the present case and the decision of the same Court in *Tyson*, et al., *Trustees of the Zenith Real Estate Trust* v. *Commissioner*, December 9, 1931, 54 Fed. (2d) 29, reversing 21 B. T. A. 656. That was the first decision upon this question by the Circuit Court of Appeals for the Seventh Circuit. The trust there involved had been organized

by four associates, three of whom were trustees, to acquire certain real estate which was occupied by a single tenant under a net lease, obligating the tenant to pay all taxes, insurance, etc. An agent was appointed by the trustees to collect the monthly rentals and see that the tenant complied with its obligations. During one of the taxable years involved, the property was sold by the trustees at a substantial profit. Holding that this trust was not taxable as an association, the Court said in its opinion:

> "Both counsel cite *Hecht* v. *Malley*, 265 U. S. 144, 44 S. Ct. 462, 464, 68 L. Ed. 949, to support their positions. Aside from the fact that it is a Supreme Court decision, we see little reason for the emphasis placed upon this holding. The question there decided is not the one here presented. It is true, the court was there considering a tax (excise), and the taxpayer, as here, was a Massachusetts trust. But here the similarity stops. 'Doing business' was the test for the imposition of the excise tax, not the character of the instrumentality that transacted the business. Moreover, to be taxable, the entity was required to be a 'corporation, joint-stock company or association, now or hereafter organized in the United States for profit.' There was not, as here, two sections of the revenue act to be construed; one covering corporations (including associations), and another covering trusts. Obviously, as the Congress in the revenue acts under consideration dealt with both entities and provided different tax rates for each, it could not have intended the term 'association' to have been synonymous with the word 'trust,' as that term was used by it. • • •
>
> "Our question then is, When is a Massachusetts trust an association under these acts, and when is it a trust? Probably the best test is to be found in the activities of the entity. One could readily conceive of a Massachusetts trust being possessed of powers and so exercising them that for taxation purposes it should be called a corporation. • • • Like-

wise, it is easy to conceive of a Massachusetts trust so designed and so purposed as to be considered a trust as that term is used in the revenue acts."

When the same question was next presented to it, in *Tyson, et al., Trustees of Chicago Real Estate Trust v. Commissioner*, Dec. 15 1933, 68 F. (2d) 584, certiorari denied 292 U. S. 657, the Court explained its prior decision as follows:

"The case of *Tyson, et al. v. Commissioner*, 54 F. (2d) 29, 31, was decided by this court shortly before the decisions were handed down by the Board in these cases, and the Board discussed it at length in its opinion. * * * This court in holding that the trustees should be taxed as fiduciaries rather than as an association stated, 'In short, the investment was one which provided with reasonable certainty for a sure and fixed income *without other care or supervision*.' (Italics ours.) Using this as a test, we think it can not be said that petitioners in the case at bar are simple fiduciaries. It seems obvious that the duties connected with their investments involved considerable care and supervision."

As shown by the opinion of the Court, the activities of the Chicago Real Estate Trust were much more extensive than those of the Zenith Real Estate Trust. This was apparently the controlling reason for the decision of the Court that the Chicago Real Estate Trust was taxable as an association. The opinion states:

"The first question then is, were the petitioners associated together for the purpose of carrying on a business enterprise, or were they merely holding property for the collection of the income and its distribution among the beneficiaries of the trust? * * *. With all these facts present, surely it cannot be said that the trustees were a mere conduit through which the income from the properties passed for distribution to

the receipt holders practically without activity on their part. We therefore conclude that the trustees were engaged in sufficient activities to warrant our holding that they were carrying on a business enterprise, hence taxable as an association."

Referring to the contention of the petitioners, that even if they were carrying on a business they would be properly subject to tax only if, in addition, they were substantially similar to a corporation in other essential characteristics of form and procedure, the Court said:

"That the organization of the trustees was of a very loose and informal character we think is not sufficient to take them out of the classification contemplated by the administrative regulations cited. Even though no formal meetings of the trustees were held, they had adopted a regular practice for the administration of their trust. At regular intervals the trustees living in Chicago would go over the accounts which were kept in the offices of their agent, and determine what dividends should be paid to the receipt holders. They would then prepare a dividend resolution and send it to the trustees who lived in Boston for their approval. The various leases on properties owned by the trustees were signed by all of them individually, with some designation of their trust capacity. Where matters arose which in the judgment of the agent needed to be considered by all of the trustees, they were handled by correspondence. Although the receipt holders never exercised their right to call meetings, they received printed annual statements shortly after the close of each fiscal year, and were thus kept in touch with the activities of the trust. The receipts evidencing their beneficial interest in the trust were engraved ones with transfer forms on the back. The trustees employed a regular transfer agent to take charge of and record all transfers of receipts. It is true that neither the trustees nor receipt holders ever drew up a code of rules or by-laws for the government of the trust,

but such action seems entirely unnecessary in view of the comprehensive nature of the trust agreement under which they were organized in the first place. We think that these facts are sufficient to warrant our classifying petitioners as a quasi-corporate organization in form and procedure and as such taxable as a corporation."

A fair analysis of this language shows that the conclusion that the trust was "a quasi-corporate organization in form and procedure" was based entirely upon the following characteristics:

(1) The trustees had adopted "a regular practice for the administration of their trust."

[It is difficult to conceive of any trust which could be administered without the adoption of some routine or practice.]

(2) The accounts would be examined by the trustees and the amount of dividends to be distributed would be determined by resolution of the trustees.

(3) Leases were made by the trustees, "with some designation of their trust capacity."

(4) Matters requiring consideration by the trustees were handled by correspondence.

(5) The receipt holders received printed annual statements and were thus kept in touch with the activities of the trust.

(6) The receipts evidencing the beneficial interests in the trust were engraved forms, with transfer forms on the back, and a regular transfer agent was employed to take charge of and record all transfers.

(7) A code of rules or by-laws was "unnecessary in view of the comprehensive nature of the trust agreement."

It is submitted that the issuance of receipts evidencing the beneficial interests is the only one of the foregoing

forms or methods of procedure which in any way resembles those characteristically employed by corporations. The Court has not said, and we believe would not be willing to say, that this characteristic alone would warrant classification as a corporation rather than as a trust for purposes of taxes. All the other features mentioned are obviously appropriate to a typical trust.

While the Court said that a code of rules or by-laws was "unnecessary in view of the comprehensive nature of the trust agreement," it might be argued with equal foundation that such rules or by-laws were unnecessary because the character of the enterprise was fundamentally different from that of a corporation. In many of the reported cases, the trust agreements have provided for meetings and elections, for shares of different classes, with different rights and preferences, and have otherwise served the functions of by-laws, but that was not true in the case of the Chicago Real Estate Trust. The Trustees were a self-perpetuating body, with no necessity for periodical elections, and with their powers and functions largely determined by the general law of trusts and only as to certain specific details governed by the trust agreement. Under these conditions, it is difficult to see how the provisions which are typical of corporate by-laws could have been appropriately adopted for that trust.

It may also be questioned whether the opinion was correct in stating that the Chicago Real Estate Trust was "a typical Massachusetts trust." The voluminous litigation and literature relating to typical Massachusetts trusts indicate that they frequently, if not ordinarily, employ many forms and methods of procedure which are characteristic of corporations and which were not employed by the Chicago Real Estate Trust nor by the Lake View Land Association.

The failure of the Circuit Court of Appeals for the Seventh Circuit to recognize the significance of the employment of corporate methods and forms is even more clearly demonstrated in its later opinion in *Reinecke* v. *Kaempfer, et al.*, June 26, 1934, 72 F. (2d) 469, certiorari denied Jan. 21, 1935, ... U. S. ..... The Court there held that a family trust, conducting a retail seed and bird store, was subject to capital stock tax as an association, and in its opinion said:

> "In these references to a similarity to corporate enterprises it surely was not intended to hold that, in order to constitute a statutory taxable association of an aggregation of persons who are not partners, there must be present all the elements and conditions essential to corporate existence. If this were so, then the entity would be a corporation and no such question could arise. A manifest distinction is the ultimate fact that the entity sought to be taxed is *not* a corporation. It must therefore be different from a corporation. The business here was, during the taxable years, carried on by these trustees in much the same manner that it had just before been carried on by the corporation; the same persons were in charge, and no difference whatever is pointed out in the manner of its conduct. The trustees, as the directors before them, met occasionally to discuss the business, and minutes of such meetings were kept; annual audits were made; merchandise was bought and sold; and so far as anything to the contrary appears there was no fundamental change in the general nature of the business during the near three-fourths of a century since it was founded and carried on with apparent success. It is plain that from its inception the business was carried on for profit. The powers and duties of the trustees in the carrying on of the business were not substantially different from those of the antecedent corporate directors. * * *

"We are satisfied that the similitude referred to is not in those essentials which distinctly stamp the entity as a corporation, but rather in the business carried on and the manner of its transaction. This entity carried on its business in substantially the same way that a corporation would have carried it on. It regularly bought and sold merchandise for the purpose of realizing profit thereon; it constituted the persons to carry on the business, and even made provision for exemption of the trustees from personal liability for trust obligations, much as in the case of business corporations."

A clearly inconsistent attitude was expressed in *Commissioner* v. *Morriss Realty Co. Trust*, C. C. A. 7, January 2, 1934, 68 Fed. (2d) 648, affirming the Board of Tax Appeals. There the Court held that there was no association in the case of a family real estate trust, which subdivided tracts conveyed by the original grant and several other tracts subsequently purchased by the trustees, sold lots on installments, erected houses, the cost of which was in part obtained from mortgages, and sold such houses on time contracts. The Court said:

"When these Regulations upon which the Commissioner relied are examined, it must be observed that to be taxed as a corporation the trust must be one which 'acts or does business in an organized capacity' (1502), and where the trustees 'are associated together in much the same manner as directors in a corporation for the purpose of carrying on some business enterprise,' (1504). • • •

"There is scarcely any trust which, in its administration, does not necessarily involve the doing of some kind of business.

"To give the Regulations and the Treasury Decision the construction contended for by the Commissioner in this case would have the force and effect of nullify-

> ing the express provisions of the statute providing that trusts shall be taxed as individuals. The expression 'for the purpose of carrying on some business enterprise' as used in the Regulations and Treasury Decision referred to, and which was undoubtedly designed to comply with what the Supreme Court said in *Hecht* v. *Malley, supra,* must be limited to trusts which carry 'on some business enterprise' for the purpose of gain or profit and under some type of corporation organization."

Two other decisions were rendered by the same Court without any attempt to express any principles upon which they rested. With both of them the present decision appears to be in distinct conflict.

The case of *Commissioner* v. *McCormick,* et al., C. C. A. 7, Jan. 24, 1934, 68 F. (2d) 653, was in many respects similar to the present case of the Lake View Land Association, although a much larger enterprise was there involved. Three brothers, owning a large office building, conveyed the property to themselves as trustees, and issued certificates of beneficial interest which were hypothecated to secure a loan. The trust indenture was involved and lengthy. The management of the property was delegated to an agent, who managed other properties of the same owners. Without any discussion of rules or standards, the Court said:

> "Looking to the substance rather than the form of this trust, to its activities rather than to its potentialities, we have no hesitation in saying that for purposes of taxation it was a trust and its income tax should be assessed on that hypothesis."

Commissioner v. *Duckwitz,* C. C. A. 7, February 9, 1934, 68 Fed. (2d) 629, involved the same Iowa-Burk Syndicate which was before the Circuit Court of Appeals for the

Tenth Circuit in *Commissioner* v. *Brouillard*, 70 Fed. (2d) 154, certiorari denied ..... U. S. ..... In holding that that syndicate was not an "association," the Circuit Court of Appeals for the Seventh Circuit said:

> "The appeal presents a borderline case which turns on the existence of sufficient facts to support the findings of the Board of Tax Appeals. * * * In reaching this conclusion we are adhering to the rule previously announced by us in *Tyson* v. *Commissioner*, 54 F. (2d) 29, and *Tyson, et al.* v. *Commissioner*, decided December 15, 1933, which makes the decision in each case turn on the facts of said case. In the case before us the facts were sufficient to support the Board's finding respecting action of the group and we therefore must accept it."

The Court's description of the Iowa-Burke Syndicate could be applied almost verbatim to the Lake View Land Association, and the Court has furnished no explanation for the contradiction in the results. In the language of the opinion in the *Duckwitz* case, describing the former trust, we have interpolated the changes necessary to apply to the Lake View Land Association, as follows:

> "If we read the evidence and the trust agreement together it seems tolerably plain therefrom that a small group of people in Charles City, Iowa, [two men in Chicago] planned a simple and inexpensive method of handling a small venture in Texas oil speculation [an apartment house investment in Chicago].
>
> "A single tract of ten acres [lot and building] was the field of their operation. Nowhere was there a suggestion that the trustees or members contemplated any oil mining [real estate investment] activities outside of this tract. Those who conceived the project planned that this local group, who were willing to back their hopes with a contribution sufficient to drill an oil well [purchase the property], should divide the profits

> [income]. The contributions of each were so small that a conveyance of a fractional interest in the real estate would have been cumbersome and impractical. [Their attorney advised them against carrying the title in their individual names.] Confidence and trust in one of the members led to the deposit of money with him, which in many instances was paid without his giving the payer any written document whatever. [The active management of the property was entrusted to one of the parties, who was in that business.]"

There can be no question that the Circuit Court of Appeals for the Seventh Circuit has wavered between two wholly inconsistent attitudes and has rendered conflicting decisions without even attempting to reconcile the results with the principles stated by the Court at one time or another. Its present decision, being opposed to the rules established by the Supreme Court and being in conflict with the decisions of the Circuit Court of Appeals, in the other Circuits, as well as contrary to its own decisions in other cases, should be reviewed.

(4) A Decision by the Supreme Court is Urgently Required, Because of the Existing Uncertainty and Inequality.

This Court has apparently recognized the need for review of the question here involved, since it has granted certiorari, on May 13, 1935, in the case of *Morrissey* v. *Commissioner*, Dkt. No. 834, which presents the same question. The Solicitor General for the United States also recognizes the need, since he has authorized the filing of a petition for certiorari, on May 27, 1935, in the case of *Helvering* v. *Coleman-Gilbert Associates*, seeking review of the decision which has been frequently referred to in this brief. That petition states:

"In the light of such confusion, the question involved is one of general importance, since there are numerous cases now in litigation and in the Bureau of Internal Revenue * * *"

From the preceding demonstration of conflict between the decisions in the various circuits, and of inconsistency in the decisions in the Seventh Circuit, it is manifest that a most unfortunate condition of uncertainty and inequality must result. It remains only to point out that the Circuit Courts of Appeals themselves, in commenting upon the lack of any generally recognized rule of decision in these cases, have persuasively argued that the Supreme Court should take jurisdiction and clarify the situation.

In *Coleman-Gilbert Associates* v. *Commissioner,* Feb. 27, 1935, 76 Fed. (2d) 191, certiorari applied for May 27, 1935, Dkt. Nos. 1003, 1004, the Circuit Court of Appeals for the First Circuit said:

"It was left for the courts or the Treasury Department by Regulations to determine what organizations are included within the term 'associations.' As yet the Supreme Court has not laid down any absolute test. * * *

"There are numerous decisions of the Board of Tax Appeals and Circuit Courts of Appeals in review, without laying down any definite line of demarkation between an association and a pure trust. * * * In any event, the decisions are seemingly in a hopeless state of confusion. * * *

"It would serve no useful purpose to attempt to analyze all the cases that have been decided by the Board of Tax Appeals and the Circuit Courts of Appeals involving this question. The lack of a conclusive test will sufficiently appear in the following cases in which the Board of Tax Appeals has been sustained in holding a trust was an association: * * * and in

the following cases in which the court has either reversed the Board in holding that the trust was an association, or has approved the Board's finding that the trust was not an association. * * *

"From the decisions of the Board of Tax Appeals and the several Circuit Courts of Appeals, it is impossible to mark out any definite pathway to follow in every case. The only conclusion is that each case must depend on its own state of facts."

The same Court said, in *Commissioner* v. *Kelley*, December 1, 1934, 74 Fed. (2d) 71:

"The decisions in which the courts have attempted to draw the line of demarkation between a trust and an association, have left it very vague and difficult of application. No absolute rule for such classification has yet been laid down by the Supreme Court, and the Regulations of the Treasury Department, 74, Art. 1314, cannot be held to be exclusive in defining the line between a trust and an association."

In *Commissioner* v. *Combs, et al.*, April 11, 1935, ... Fed. ....., the Circuit Court of Appeals for the Ninth Circuit said:

"The question as to whether or not organizations are taxable as associations under the Revenue Act is one that has been frequently before the courts and is not free from difficulty. * * * We think it unnecessary to enter into an extended discussion of the various decisions of the courts of appeals dealing with the question, or to attempt to establish the proper rule for determining the question of tax liability."

In *Morrissey* v. *Commissioner*, Jan. 7, 1935, 74 F. (2d) 803, certiorari granted May 13, 1935, the same Court said:

"As to the contention that 'doing business' is not controlling or relevant, this court in *Twin Bell Oil Syndicate* v. *Helvering*, 70 F. (2d) 402, at page 407

(C. C. A. 9), after quoting from its opinion in the *Trust No. 5833, Security-First National Bank* v. *Welch*, 54 F. (2d) 323 (C. C. A. 9) said: 'There is ample additional authority for the proposition that the "business" test is now paramount.' • • •

"It is now well settled that beneficiary control is not a requisite to the taxability of a trust as a corporation. *Twin Bell Oil Syndicate* v. *Helvering, supra.*"

From the decisions which have been discussed under this and the preceding points, it is obvious that there is no clearly established or generally recognized rule of decision upon this question. The different Circuit Courts of Appeals have formulated entirely different standards for measuring the resemblance of a trust to a corporation, and in the Seventh Circuit no definite standard or rule has been expressed at all. Consequently, under essentially similar circumstances, tax liability is being determined upon one basis in one Circuit and upon an entirely different basis in other Circuits. In the Seventh Circuit, a taxpayer is almost entirely without guidance as to the standards by which his tax liability will be measured. The rules which were announced many years ago by this Court are not being applied.

That large numbers of taxpayers and large amounts of taxes are affected by this uncertainty and confusion is demonstrated by the large number of cases which have been decided by the various Circuit Courts of Appeals, only a few of which have been mentioned in this brief, and by the even larger number which have been and are being decided by the Board of Tax Appeals. Until an intelligible rule is established, almost any decision of the Board of Tax Appeals or of a District Court will require an appeal to the Circuit Court of Appeals, and almost any decision of a Circuit Court of Appeals will justify a petition for cer-

tiorari to this Court. Great hardship has already resulted because the situation has not previously been clarified, and a review of the question by this Court should no longer be delayed.

Conclusion.

It was obviously the purpose and intention of Congress that the tax burdens imposed upon business corporations should likewise be shared by those unincorporated enterprises which were essentially similar to a corporation in form of organization and mode of operation. The attitude of the Supreme Court in *Hecht* v. *Malley* and in *Burk-Waggoner Oil Association* v. *Hopkins*, is completely in accord with this legislative purpose. In the other Circuits, this legislative intention has been quite generally recognized, but it has been ignored and defeated by the Circuit Court of Appeals for the Seventh Circuit. In the present case a trust which has no substantial resemblance to a corporation in form or in operation has been subjected to the corporate tax. That decision should therefore be reviewed and reversed by this court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 108

JOSEPH E. SWANSON, et al., As Trustees of the LAKE VIEW LAND ASSOCIATION,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

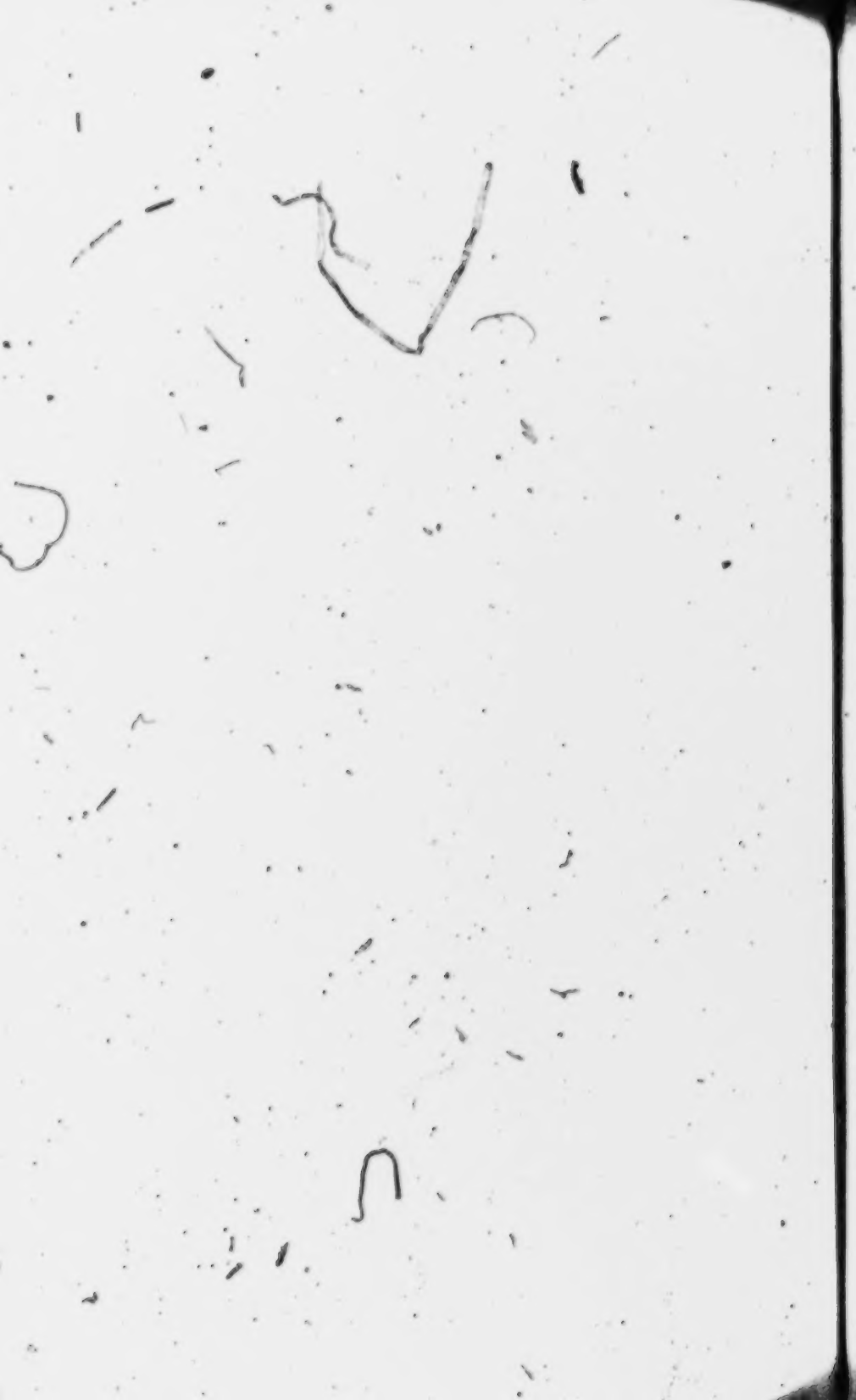
BRIEF FOR PETITIONERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 108

JOSEPH E. SWANSON, ET AL., AS TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR PETITIONERS

STATEMENT OF THE CASE.

Jurisdiction.—This case is before this Court on a writ of certiorari, granted October 14, 1935, to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed decisions of the United States Board of Tax Appeals sustaining the determination of income tax deficiencies for the years 1925 and 1926.

Opinion Below.—The opinion of the Circuit Court of Appeals (R. 40-46) is reported at 76 Fed. (2d) 651-653.

The Board of Tax Appeals rendered a memorandum opinion (R. 19-30), which is not officially reported. After reciting the facts found by the Board, this opinion states that the decision is governed by the case of *Joseph E. Swanson, et al., Trustees of the Fullerton Parkway Land Trust*, 29 B. T. A. 1123.

The Question Presented.—The only issue in this case is whether the income of the Lake View Land Association for the years 1925 and 1926 was subject to tax as the income of a trust, under Section 219 of the Revenue Act of 1926 (c. 27, 44 Stat. 32), or whether the trust was an "association" under Section 2 (a) (2) of that Act (44 Stat. 9), so that its income was taxable under Section 230 (44 Stat. 39) as the income of a corporation.

More specifically, the question is whether an "association" which is taxable as a corporation was created by two owners of a three-story apartment building, in which one of them lived, who transferred title to themselves and another as trustees, where the property was managed by one of the owners, as a partner of the real estate management firm which was employed as the agent for the trustees, in consultation with the other owner. During the taxable years here involved, the beneficial owners were the wives of the original owners.

The petitioners contend that this is a case of simple joint ownership of income producing property, and that the income should be taxed directly to the individual owners, as it is under the trust method. A greater tax is imposed if there was an "association."

Specification of Error.—The only error to be argued is that the Court below erred in failing to reverse the decision of the Board of Tax Appeals, as erroneous in law,

on the ground that the decision of the Board was not sustained by the facts found by the Board but was in conflict with those facts, which required the conclusion in law that this trust was not an "association" under the statutory provisions involved.

The Facts—A condensed statement of the facts was contained in the opinion below (R. 44-45) and is here reprinted in full (interpolations [*in brackets and italic type*] and footnotes having been supplied), as follows:

> "Joseph E. Swanson and Ralph C. Otis were the owners of a three-story apartment building containing nine apartments [*which had been completed more than a year before the trust was created* (R. 26)]. On June 1, 1915, [*at the suggestion of their attorney* (R. 27)] they entered into a trust agreement for the purpose of carrying the title to the real estate. [*At that time, and until 1926, the petitioner Swanson was living in one of the apartments* (R. 28)]. The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. In 1926, James Otis succeeded his father as trustee.
>
> "Under the trust agreement, the trustees were given the complete management and control of the property, to exchange, reconstruct, remodel, sell or improve at their discretion or to borrow money secured by the property. They were authorized to rent suitable quarters for the transaction of the business of the trust and employ such assistants as they required. The agreement provided for the issuance of 'receipts' to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to

their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued;[1] that neither the trustees nor the beneficiaries should be personally liable[2] and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expiration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary. * * *

"The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the affairs of the property, kept no minute book, had no by-laws. They elected no officers and no so-called board of directors."

In addition, the following noteworthy facts were included in the findings of the Board of Tax Appeals.

The property to be acquired was specifically described in the trust agreement (R. 19). This property has not been sold, although there have been many opportunities to sell at a large profit; nor have the trustees ever ac-

---

[1] This must imply that the trustees could sue and be sued *as individuals*, and not the trust as an entity, as that would not be sanctioned by the law of Illinois. *Wahl* v. *Schmidt*, 307 Ill. 331, 138 N. E. 604.

[2] This provision would be without legal effect in Illinois, in that the trustees would nevertheless remain personally liable, with a claim for reimbursement from the trust estate. *Austin* v. *Parker*, 317 Ill. 348, 148 N. E. 19. And see discussion herein, at page 35.

quired or negotiated for the purchase of any other real estate (R. 28, 29).

The renting of the apartments in the building and all other necessary management of the property, and also the distribution of the net income, was done by a partnership known as Willoughby & Co., of which Joseph E. Swanson was a partner. This firm was engaged in the business of buying and selling real estate as a broker and in the business of managing properties (R. 27). The management of the property by Willoughby & Co. was directed by Ralph C. Otis and Swanson, and the entire affairs of the trust were at all times in their hands (R. 27-28).

SUMMARY OF ARGUMENT.

The Lake View Land Association, it is submitted, should not be taxable as a corporation under almost any definition of the statutory term "association." It was not engaged in carrying on a business and it employed none of the characteristic corporate forms of organization or methods of procedure. It was merely an arrangement for the convenient holding of the title to a single parcel of real estate owned by two individuals as an investment. Essentially it was a simple joint venture.

Its counsel do not agree, however, with the position taken by counsel for the Government (in the brief heretofore filed upon the same question in the pending case of *Morrissey, et al.* v. *Commissioner*, Docket No. 17) as to the general rule of distinction between an "association" and an enterprise which is otherwise taxable.

It has already been established by the decisions of this Court that an "association" exists for this purpose only where there is substantial resemblance to a corporation.

The present issue concerns entirely the identification of those characteristics in which resemblance is significant and the determination of the relative importance of various features of similarity and difference.

The principal conflict in the decisions of the Circuit Court of Appeals, and between the parties here, relates to the contention of the Government either that the conduct of business is alone conclusive, or at least that it is of primary significance. Counsel for the Government argues that it need be accompanied only by the additional corporate attributes of centralized control, continuity of existence, and limited liability. We contend that the particular corporate attributes mentioned are entirely without significance, since they are traditionally characteristic of a true trust, as well as of a corporation. We further contend that the doing of business is not a conclusive test (except perhaps in the negative sense, in that there is no association unless a business is carried on), and that this is merely one element among many to be considered.

Classification as an association, we submit, should depend upon a weighing and balancing of resemblance to a corporation with respect to a number of characteristic and distinctive features of form and mode of organization and procedure, which have varying degrees of relative significance. As has been held in many decisions, even when a trust is engaged in business, it is properly subject to tax as an "association" only if there is a preponderance of resemblance to a corporation with reference to all relevant features of similarity or difference. The obvious purpose and intention of Congress, that the tax burdens imposed upon business corporations should likewise be shared by those unincorporated enterprises which are essentially similar to corporations, can not be effectuated by any simple and categorical test.

Of the many corporate characteristics which have been regarded as significant in this connection, only three seem to be essential, and then only in a negative sense. We submit that there can be no "association" except (1) by the voluntary act of the interested parties, who have adopted at least (2) some minimum of structure of organization and formality of procedure, through which they are engaged in (3) carrying on a business.

The familiar case of the creation of a business trust, even under a formal organization, by a testator or settlor for the benefit of other persons should not be included. Further, where there is no formality of organization or procedure except the holding of title to property in trust, voluntary association for a business purpose is not to be distinguished as a basis of classification for income tax liability from the typical partnerships, syndicates, pools, and many other forms of joint adventure which have never been regarded as taxable as corporations.

Even the three corporate characteristics above mentioned, however, should be considered in connection with others which are important even though they have perhaps less weight, including the following:

(4) Control of the enterprise by the beneficiaries, particularly if exercised through the characteristic corporate method of election.

(5) Majority rule, that is the power of a majority to bind all the interested parties, as contrasted with the requirement for unanimous consent.

(6) The aggregation of large capital contributed by a large number of investors.

(7) Preferences and priorities among owners.

(8) Legal entity or personality, or some of its attributes, such as the power to sue and be sued or other recognition or control by state statute.

Many details of form or procedure, such as a managing board, officers, meetings, records, reports, name, and seal, are frequently mentioned as independent grounds of resemblance to a corporation. It seems, however, that while they indicate some formality of organization or other essential element of resemblance to a corporation, and may become important in connection with other features, no one of them should have much weight standing alone.

The term "limited liability," loosely used to designate an alleged corporate characteristic, in fact offers no basis for distinction. Although the limited liability of shareholders is a most important corporate attribute, it is equally characteristic of a true trust that the beneficiaries incur no personal liability. On the other hand a "trust association" normally involves the personal liability of the beneficiaries. Under any trust, whether or not an "association," the trustees incur unlimited personal liability notwithstanding provisions to the contrary in the trust instrument, except as otherwise provided by statutes or specific contracts.

A continuity of succession, regardless of changes of trustees or transfers of beneficial interests, is characteristic of all trusts, as well as of corporations.

Under any general rule or test, the Lake View Land Association should not be taxed as an "association" because it had no essential resemblance to a corporation. It employed none of the forms of organization or methods of procedure which are characteristic of corporations. Its income-producing activities (which must obviously be of primary significance in the determination of classification for income tax liability) were no different in any essential feature of method or form from those of a typical joint venture. The trustees (later their wives) were themselves the beneficial owners of the property, and all their func-

tions as trustees were performed exactly as if the title had been held merely in a simple tenancy in common.

The trust was not engaged in carrying on a business. For this purpose, it has been generally recognized that the holding of investment property, requiring no extensive activities, is to be distinguished from the active conduct of a commercial business, including the buying and selling of real estate. As to the character and extent of its business operations, the Lake View Land Association was obviously much less engaged in the conduct of a business than were the enterprises which have been held taxable as trusts in many other cases, including several decisions of the Circuit Court of Appeals for the Seventh Circuit, and including the case of the Coleman-Gilbert Associates which is now before this Court.

Since the Lake View Land Association had no substantial resemblance to a corporation in form of organization or method of operation, it should not be taxed as an association.

ARGUMENT.

(1) The Term "Association" Includes Only Those Organizations Which Have the Essential Characteristics of Business Corporations.

Under almost any definition of the term "association" the Lake View Land Association, as is later argued herein, should not be taxable as a corporation. Consequently it may be questioned whether this brief would be justified in discussing at great length the fundamental questions involved in the many decisions which have dealt with the definition of that term. This is particularly true since these questions have already been and will be presented to this court in the pending case of *Morrissey*, et al. v. *Commissioner*, Docket No. 17, previously argued and submitted, and in the following cases which are to be argued at the same time as the present case, namely: *Helvering* v. *Coleman-Gilbert Associates*, Docket Nos. 78, 79; *Helvering* v. *Combs*, Docket No. 238.

The consideration of the particular facts of the present case, however, requires a foundation of general discussion of the principles to which these facts are to be related. Moreover, although it is argued that this case should be decided in favor of the taxpayer even under the general rules which Government counsel has advocated in other cases and presumably will here urge, the counsel for the Lake View Land Association do not acquiesce in the position taken for the Government. It is therefore necessary at least to review the major aspects of the

general grounds of distinction between an enterprise which is taxable as an "association" and one which is taxable as a trust.

We are here concerned merely with the particularization of a general rule which is already clearly established. The general definitions of the term "association" were set forth by this court in its much-quoted opinion in *Hecht* v. *Malley*, 265 U. S. 144, 157, decided May 12, 1924. Ten years ago, in the case of *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110, decided November 16, 1925, this Court said (at pages 113, 114), referring to joint stock associations:

> "They have usually a fixed capital stock divided into shares represented by certificates transferable only upon the books of the company, manage their affairs by a board of directors and executive officers and conduct their business in the general form and mode of procedure of a corporation. **Because of this resemblance in form and effectiveness,** these business organizations are subject by the Act to these taxes as corporations."

In view of these prior decisions of this Court and the arguments presented by all the parties in the [illegible]ed cases now under consideration by this Court, it is submitted that all may agree upon the following statement of the general rule:

> **Any association of individuals, for any purpose, is taxable as a corporation if it sufficiently resembles a corporation in those characteristics which are essential or substantially important with relation to the subject matter of the statute in question, namely the receipt of income. Without such essential resemblance to a corporation, there is no "association" taxable as a corporation.**

The difference of opinion relates entirely to the identification of those characteristics which are substantial, as distinguished from those which are merely incidental. The conflict in the decisions of the Circuit Courts of Appeals, and the issue between the parties here, are concerned wholly with such distinctions, including the questions:

(1) Whether the conduct of business is alone determinative, is merely one of the factors to be weighed, or is entirely irrelevant?

(2) Whether form of organization and method of procedure are controlling, merely indicative, or entirely irrelevant?

(3) What characteristics of form of organization and method of procedure are significant at all, and what weight is to be given to those which are significant?

It is here contended, first, that the doing of business is an element to be considered but is not a conclusive test (except perhaps in a negative sense), and, second, that classification as an association should depend upon a weighing and balancing of resemblance to a corporation in a number of characteristic and distinctive features. The points of resemblance which are frequently referred to (including some which, it is submitted, should in fact have no significance) and others which seem to us to be significant, will be separately considered.

(a) The "business test" is not determinative (except that there is probably no "association" if no business is carried on).

Counsel for the Government argues (page 13 of brief in the *Morrissey* case, Dkt. No. 17) "that a trust under

which a combination of persons were doing business would be an association irrespective of beneficiary control and, in the alternative, that if that decision [*Hecht* v. *Malley*] made the further requirement that the trust must resemble a corporation, this requirement was simply that the trust should have the attributes of a corporation such as centralized control, continuity of existence and limited liability, regardless of forms used in effecting them."

Again (*Morrissey* brief, page 21), it is urged that "either the business test must be considered conclusive in itself or conclusive where there are some or all of the elements of centralized control, limited liability and continuity of the business regardless of death or transfers of interest and that it is not important whether the trust has certificates of stock or other external features of a corporation."

Although it is later contended herein (page 39) that even if "the business test must be considered conclusive in itself," the Lake View Land Association would not be an association for the reason that it was not engaged in the conduct of a business, within the scope of that term as here employed, it may first be briefly argued that the position of Government counsel, as above stated, is unsound in this respect. The alternative contention of Government counsel as to the other significant features is later considered.

The conduct of a business, or the business character of the trust activities, is not even mentioned in the definitions quoted by this Court in *Hecht* v. *Malley*, 265 U. S. 144, 157, which refer only to "the prosecution of some common enterprise" and "the prosecution of some purpose." As compared with the overemphasis upon this feature of distinction in the language of some of the decisions upon which the Government counsel relies, the rule here advocated has been stated by the Circuit Court of Appeals for

the Tenth Circuit in *Commissioner* v. *Brouillard*, 70 Fed. (2d) 154, certiorari denied under title of *Helvering* v. *Pryor & Lockhart Development Co.*, 293 U. S. 574, as follows:

> "The fact that a group associate themselves together for the purpose of engaging in business for profit does not necessarily mean that they must be taxed as an association. That is not the decisive consideration."

The Circuit Court of Appeals for the First Circuit has expressed the same view, in the case now under review, *Coleman-Gilbert Associates* v. *Commissioner*, 76 Fed. (2d) 191, as follows:

> "We think, however, it is generally agreed that, in order for a trust to be taxed as a corporation, the trustees must not only be carrying on a business enterprise for profit, but must be doing it in much the same manner and form as directors of a corporation."

A similar attitude was expressed by the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *Morriss Realty Co. Trust*, 68 Fed. (2d) 648, affirming the Board of Tax Appeals. There the Court held that there was no association in the case of a family real estate trust, which subdivided tracts conveyed by the original grant and several other tracts subsequently purchased by the trustees, sold lots on installments, erected houses, the cost of which was in part obtained from mortgages, and sold such houses on time contracts. The Court said:

> "When these Regulations upon which the Commissioner relies are examined, it must be observed that to be taxed as a corporation the trust must be one which 'acts or does business in an organized capacity' (1502), and where the trustees 'are associated together in much the same manner as directors in a corporation for the purpose of carrying on some business enterprise' (1504). * * *

"There is scarcely any trust which, in its administration, does not necessarily involve the doing of some kind of business.

"To give the Regulations and the Treasury Decision the construction contended for by the Commissioner in this case would have the force and effect of nullifying the express provisions of the statute providing that trusts shall be taxed as individuals. The expression 'for the purpose of carrying on some business enterprise' as used in the Regulations and Treasury Decision referred to, and which was undoubtedly designed to comply with what the Supreme Court said in *Hecht* v. *Malley, supra,* must be limited to trusts which carry 'on some business enterprise' for the purpose of gain or profit and under some type of corporation organization."

The fact that an enterprise is engaged in active business is at least an element of resemblance to the typical corporation, as opposed to the typical holding trust. Very many corporations, however, are engaged in the mere holding of property, in operations not for profit, or in other non-business activities, and very many typical true trusts are engaged in the active conduct of businesses of all kinds. In addition, much business is carried on by ordinary partnerships, syndicates, pools, and other groups which clearly are not "associations." Although it may be true that *most corporations* which are subject to corporate income tax are engaged in carrying on business, it certainly is not true that *most business* is carried on by such corporations. Therefore, this ground of classification as an "association" must be given merely a contributory significance in a case otherwise very close.

It is significant that business activities of great variety, volume, and continuity have been carried on by trusts which have nevertheless been held not to be associations.

The essential features of such decisions may be briefly indicated as follows:

Commissioner v. *Brouillard*, C. C. A. 10, 70 Fed. (2d) 154, certiorari denied under title of *Helvering* v. *Pryor & Lockhart Development Co.*, 293 U. S. 574, affirming the decisions of the Board of Tax Appeals. Three oil development syndicate trusts (one of which was also held not an association in *Commissioner* v. *Duckwitz*, C. C. A. 7, 68 Fed. (2d) 629). The trustee of the so-called Pryor & Lockhart Development Co. procured the drilling of six oil wells on the trust property by an agreement with drilling contractors, and also arranged for the drilling of two wells by the same contractors upon the property of two other owners. The oil produced from the trust property was sold. After paying current expenses, the trustee distributed the net income among the beneficiaries, using the employees of a partnership of which he was a member. The trustee also employed a superintendent and pumper.

Commissioner v. *Kelley*, C. C. A. 1, 74 Fed. (2d) 71, affirming Board of Tax Appeals. Trustees conducted an active manufacturing business under the name of Union Paste Co.

Commissioner v. *Guitar Trust Estate*, C. C. A. 5, 72 Fed. (2d) 544, reversing Board of Tax Appeals on other grounds but sustaining its holding that a trust managing large tracts of real estate and much personal property and carrying on a ranching business, a cotton business, and a cotton seed business, was not taxable as an association.

Lucas v. *Extension Oil Company*, C. C. A. 5, 47 Fed. (2d) 65, affirming the Board of Tax Appeals. Drilling an oil well, including employment of labor, furnishing of material, etc.; production and sale of oil, and collection of oil royalties; sale of lease.

Blair v. *Wilson Syndicate Trust,* C. C. A. 5, 39 Fed. (2d) 43, affirming the Board of Tax Appeals. Operation of a twelve story office building and an eight story office building; joint ownership of a theater property, another rented building and two cattle ranches, each of which was operated by another of the joint owners; the exchange of an office building for cattle ranches, which were thereafter operated under contract on behalf of the trustees.

Fisk, et al. v. *United States,* District Court, Mass., 60 Fed. (2d) 665. Eleven parcels of land were sold and a building was remodelled into four separate buildings, of which two were sold.

The Board of Tax Appeals, which began by giving unduly great weight to the "business test," misconstruing the decision of the Supreme Court in *Hecht* v. *Malley,* has in its later decisions consistently recognized the rule that there is an "association" only when the conduct of a business is accompanied by some measure of employment of essential corporate forms and procedure.

See:

Dolese & Shepherd Co., 30 B. T. A. 1171.

E. A. Holmes, 27 B. T. A. 1229.

Pryor & Lockhart Development Co., 26 B. T. A. 1054, affirmed by *Commissioner* v. *Brouillard,* C. C. A. 10, 70 Fed. (2d) 154.

Rollin S. Sturgeon, 25 B. T. A. 368.

Jackson-Wermich Trust, 24 B. T. A. 150.

It is submitted that what should be merely a negative rule has been improperly extended into a positive one. We agree that if a trust is not engaged in the conduct of a business it should not be classified as an association, except perhaps that a number of other considerations might some-

times clearly require the contrary result. In other words, it should normally be true that to be an association a trust must be engaged in the conduct of a business. On the other hand, we agree that to carry on business, while not alone a sufficient reason for subjecting a trust to income tax liability as a corporation, is one of those characteristics of a business corporation which should be taken into consideration in resolving this issue. But to say that every trust which is engaged in active business is for that reason taxable as an association ignores entirely the fundamental basis of the statutory classification, which this Court has said rests upon a "resemblance in form and effectiveness."

The Board of Tax Appeals has made what appears to be a correct application of the rule. In the case of *Terminal Properties Co.*, 19 B. T. A. 584, the Board said:

> "An association is an unchartered organization employing the characteristic form and procedure of a corporation in the prosecution of a business enterprise. The test to be applied is pragmatic. Did the syndicate in its purpose, form and operations so resemble a corporation that it should be taxed as such? * * * Concluding as we do that the syndicate was not engaged in any business enterprise it follows *per necessitate* that it did not employ the forms and procedure usually followed by incorporated bodies in carrying on a business."

It is therefore submitted that even when a trust is engaged in business, it is properly subject to tax as a corporation only if it is substantially similar to a corporation in the essential characteristics of form and procedure. If the trust is not engaged in business, it is not to be taxed as a corporation unless other considerations clearly require that result.

(b) In many features of organization and procedure, of varying significance, there must be a preponderance of resemblance to a corporation.

The problem of disposing of thousands of cases involving infinite variations of fact has naturally created a strong desire for a simple test which would mechanically distinguish an "association" from an enterprise otherwise taxable. Any such result, however, would be directly in conflict with the broad and elastic rule of the statute and the prior decisions of this Court. It was obviously the purpose and intention of Congress that the tax burdens imposed upon business corporations should likewise be shared by those unincorporated enterprises which are essentially similar to a corporation in form of organization and mode of operation. This essential similarity can not be determined with reference to any one feature or aspect, since this may be inconsistent with some other comparison of equal significance. Necessarily, therefore the resemblance must be appraised with reference to all relevant features of similarity or difference.

We can agree completely with the position of the Government (*Morrissey* brief, p. 24) that "the attributes which are important are those of substance and not of form." This, however, answers nothing but merely presents the essential question, which is to distinguish between the substantial and the merely formal differences between the corporate or association type and the trust type of relationship.

The voluminous litigation and literature relating to the so-called Massachusetts trusts and similar trusts, as well as the income tax cases involving such trusts, indicate that a typical trust of that character frequently, if not ordi-

narily, employs many forms and methods of procedure which are characteristic of corporations, including most frequently:

(a) Periodical meetings of beneficiaries.

(b) Election of managing trustees, serving for short terms, by beneficiaries, by majority vote in formal meeting.

(c) Control of the trustees and their activities by the action of a majority of those beneficially interested, voting in formal meetings.

(d) Action of the managing trustees only as a body, meeting as such, rather than as individuals.

(e) Selection by the trustees of managing officers, having titles and duties similar to those of corporations.

(f) The issuance of shares of different classes, including some with preferences as to dividends or in liquidation.

(g) The conduct of a commercial business, under a trade name.

(h) Capacity to sue and be sued as an entity, under state statutes.

For illustration, see:

Little Four Oil & Gas Company v. *Lewellyn*, C. C. A. 3, 35 Fed. (2d) 149, certiorari denied, 280 U. S. 613. Common and preferred stock; annual meetings of shareholders.

Trust No. 5833, Security-First National Bank, etc. v. *Welch*, 50 Fed. (2d) 613, affirmed, C. C. A. 9, 54 Fed. (2d) 323, certiorari denied, 286 U. S. 544. A "board of syndicate managers," chosen by and removable by beneficiaries.

Pritchett, et al. (3 cases), 17 B. T. A. 1056, 1064, 1071. Preferred and common shares; name; meetings of beneficiaries; successor trustees elected by beneficiaries.

E. A. Landreth Co., 11 B. T. A. 1. Capacity to sue and be sued as an entity; seal and name; shareholders, by majority vote, could remove trustees and fill vacancies.

Durfee Mineral Co., 7 B. T. A. 231. Joint stock association; capacity to sue and be sued as an entity; officers, by-laws, minutes, seal, name; meetings of beneficiaries.

It may be questioned whether any test is conclusive, except in the negative sense. That is, there seems to be no corporate characteristic which is of itself so significant that it alone would always indicate an association. Several, however, may be so important that the absence of any one of them would be inconsistent with association status. For example, an enterprise which much resembled a corporation in formal organization might not be properly taxable as such because it was not engaged in any business, or because it was organized under a will rather than by the voluntary action of the beneficiaries. On the other hand, it seems clear that a voluntary enterprise for the conduct of an active business under the control of the owners is not to be distinguished from an ordinary partnership if it is entirely lacking in the organization and procedure of a corporation.

It is therefore submitted that any attempt to formulate a simple and categorical rule for distinguishing an "association" from enterprises otherwise taxable is misdirected and misleading. Apparently this is simply one more of the

numerous legal distinctions which must rest upon the weighing and balancing of a number of factors, all of which are relevant but none of which are conclusive. The present problem is to isolate and identify such factors, and to determine their relative weight.

Only by analysis of the characteristic corporate form and procedure into its separate elements can this problem be intelligently discussed. We therefore submit the following enumeration of corporate characteristics, each of which is separately discussed below, which we believe fall into the four classes described.

Corporate Characteristics

In Order Of Importance

I. *Negatively essential—that is, the lack of any one of these characteristics would tend strongly to indicate that there is no "association":*

1. Voluntary association.
2. A minimum of formal organization.
3. Business activity.

II. *Very significant if present, but not essential:*

4. Control of enterprise by beneficiaries.
5. Majority rule.
6. Aggregation of large capital contributed by a large number of investors.
7. Preferences and priorities among owners.
8. Attributes of legal entity.

III. Having some little significance if present, but absence not significant:

9. Details of form or procedure—managing board and officers; meetings, records, and reports; name and seal.

IV. Having no significance, because, although ostensibly characteristic of corporations, in fact equally characteristic of trusts:

10. Limited liability.

11. Continuity.

12. Transferability of interest; issue of certificates.

The brief of the Government in the *Morrissey* case (pp. 7, 13, 21) assumes without discussion that the essential attributes of the corporate form are:

> Centralized control (referring not to control by the beneficial owners but to the control of the enterprise by the managing agency);
>
> Continuity of existence (regardless of death or transfer of beneficial interest);
>
> Limited liability.

The difficulty about this suggestion is that each of these attributes is essentially characteristic of the typical true trust, as well as of the corporation.

In the same brief it is pointed out (pp. 21-22) "that the ordinary trust *per se* has certain corporate attributes in that ordinarily there is no personal liability of trustees or beneficiaries and the beneficiaries are free to dispose of their beneficial interests." While this statement is apparently incorrect with reference to the personal liability of

the trustees hereinafter licensed), indicates that two of the features named as counsel and commonly regarded as significant, namely, the absence of personal liability of beneficiaries and the transferability of beneficial interests without interrupting the continuity of the enterprise, are equally characteristic of the one trust and the corporation. On the contrary, unlimited liability of the beneficiaries is quite characteristic of an association as shown below. Consequently these features have no value for distinguishing an association from a one trust.

Voluntary Association

We would put at first place as a negative requirement that the association must be the voluntary act of those beneficially interested. The familiar case of a testator or settlor who establishes a business trust for the benefit of donees has obviously no resemblance to the typical situation of the unincorporate form by persons who seek a common objective. While not every voluntary group is an "association," certainly there is no such taxable entity where the members of the group have not joined it by their own will.

One of the first and most striking instances of difficulty and resistance encountered in the attempt to apply the "business" test was the case of *Blair v. Wilson Syndicate Trust*, [ ] U. S. [ ], 9 Fed. (2d) 43, where the Court said (pp. 43, 46):

> "It is contended that the test is whether the respondent was conducting a business and the beneficiaries had control of the trustees. . . . The test urged by the petitioner has no application to the facts in this case. A distinction is to be made between an agreement between individuals in the form of a trust and an express trust created by an ancestor, although

> they may have some features in common. The controlling distinction is that one is a voluntary association of individuals for convenience and profit, the other a method of equitably distributing a legacy or donation."

Although this case actually demonstrates that all elements of resemblance to corporate forms and procedure are important, it has been interpreted as the authority for a limitation upon or exception to the rule of the "business test." Thus, the Board of Tax Appeals has said, in *Morriss Realty Company Trust*, 23 B. T. A. 1076, affirmed 68 Fed. (2d) 648:

> "Where the ancestral element has been present and the evident object of a trust has been liquidation of property, the Board has followed the principle of *Blair* v. *Wilson Syndicate Trust*, *supra*, and held such bodies trusts and not associations."

For a later qualification of this rule, see *Dauphin Deposit Company*, 21 B. T. A. 1214.

2. *A Minimum of Formal Organization*

Clearly there can be no "association" without some structure of organization and some formality of procedure. Informal association for business purposes is characteristic of partnerships, syndicates, pools, and many forms of joint adventure, which have never been regarded as taxable as corporations under the Federal income tax laws.

As the court said in *Bouchard* v. *First Peoples Trust*, 253 Mass. 351, 361 (involving a question of state legislation):

> "The various definitions of the word 'association', all imply, if they do not require, as an essential element, that there be some form of organization re-

sembling modes of procedure inherent in incorporated bodies. A business corporation is unthinkable where the shareholders are devoid of legal rights, have no officers and are and must remain forever dumb as to the selection, approval or disapproval of managers and methods of conduct of corporate affairs."

Certain elements of formality of organization are often referred to as independent corporate characteristics, including a managing board, officers, meetings, records, reports, a name and a seal. It is submitted that these features have merely incidental significance with reference to this and other more essential aspects of resemblance to a corporation.

The "centralized control" to which Government counsel refers (*Morrissey* brief, pp. 13, 21) can not serve as the required minimum of formal organization, since any trust necessarily provides a centralized control and management of the trust property.

The entire absence of employment of a corporate form or organization or a corporate mode of procedure has apparently been the ground of the decision that no association existed, without regard to the character or extent of business activities, in a number of cases of the Board of Tax Appeals, involving simple syndicates, as follows:

Myers, Long and Company, 14 B. T. A. 460.
Realty Associates, 17 B. T. A. 1173.
McGlone, 22 B. T. A. 358.
The Royal Syndicate, 20 B. T. A. 358.
Winston, 22 B. T. A. 1194.

Whether an elaborate organization following corporate forms should alone be enough to constitute an "association" is a different and difficult question. At least it would be a significant element to be considered in relation to other resemblances and differences.

3. Business Activity

The fact that an active business is carried on is at least an element of resemblance to the typical corporation, as opposed to the typical holding trust. As above argued (page 12), however, this is not a decisive or controlling test, but has merely a contributory significance or is at most a negative requirement, in that there is no "association" if no business is carried on.

4. Control of Enterprise by Beneficiaries

Control of the management of the enterprise by those beneficially interested, while certainly not to be regarded as a conclusive test, is just as certainly a characteristic feature of the corporate form of organization and must be given some weight. As the Board of Tax Appeals has said, in *Extension Oil Co.*, 16 B. T. A. 1028, 1034, affirmed C. C. A. 5, 47 Fed. (2d) 65:

> "* * * we should not forget that it is the usual custom for stockholders of a corporation to meet at stated intervals and elect directors for stated terms and thus to a certain extent exert control over corporate affairs. The absence of such control is assuredly an element which should be taken into consideration. Here the shareholders could exert no control whatever over the trustees, who were self-perpetuating. In this respect petitioner more closely resembled a trust than an association."

Where an effective control is informally exercised, as where the beneficiaries are themselves the trustees or are in frequent and close contact with the trustees, there is suggested not so much the characteristic corporate procedure but rather the common participation of the mem-

bers of a partnership in the firm business or the control by the parties to a typical joint venture over their common managing agent.

5. Majority Rule

The power and right of a majority to bind the whole group is characteristic of the corporate form of organization, as contrasted with the typical requirement for unanimous consent, except within the rather narrow limits of an original grant of authority, which is traditionally characteristic of partnerships, joint ventures, and trusts. This refers not to the control by the beneficiaries over the managing agency, but to the power of a majority of the beneficiaries to express a decision which is binding upon all.

A somewhat similar but essentially unrelated difference is that a group of trustees is traditionally required to act only by the combined and unanimous action of all of them, while a corporate Board of Directors traditionally acts by the act of a majority of its members. The delegation of authority by a Board of Directors to corporate officers is a characteristic procedure of similar nature.

It has been pointed out in General Counsel's Memorandum, 7475, IX-1 C. B. 177, published as a Ruling of the Bureau of Internal Revenue, that when the co-owners of property "have agreed to be bound by the decision of a majority in interest * * * they have adopted the characteristic mode of action of all associations, and have abandoned the characteristic mode of action of mere co-owners, who, when acting at all, act unitedly."

6. Aggregation of Large Capital Contributed By a Large Number of Investors

An outstanding feature of the economic significance of incorporated business is that the corporation is characteristically an instrument for assembling a large aggregate of capital from a large number of persons for investment in a business. Where the amount of such capital is so large and the number of such persons is so great that the more simple type of partnership, syndicate or joint venture form of organization would not ordinarily be satisfactory, probably an association adapted to those conditions would in that regard bear a material resemblance to a corporation.

On the other hand, corporations have been so extensively used for business ventures involving only a small capital, and only a few stockholders or even a single stockholder, that this point of comparison probably cannot be given more than contributory weight. At least, however, it may be said that, where only a few persons and only a small capital are involved, in these respects the enterprise resembles the typical partnership or joint venture as much as it does a corporation, and therefore that it should not be held an association unless other features require that conclusion.

A somewhat related economic feature which is significantly characteristic of a corporation is the authority of the Board of Directors to distribute income in their discretion and to accumulate a surplus for employment in the business. Frequently trustees of a pure trust are also given the authority to make similar accumulations in their discretion. More commonly, however, trustees are either required to distribute currently all the net income, or ac-

cumulation is restricted as to purpose or amount. This is, then, a feature to be considered but it probably has merely contributory weight.

7. Preferences and Priorities Among Owners

Distinction between classes of shares, such as preferred and common, is decidedly characteristic of the corporate form of organization, and has frequently been employed by business trusts, such as those involved in *United States v. Veal*, 28 Fed. (2d) 1022, and *Little Four Oil & Gas Co. v. Lewellyn*, 35 Fed. (2d) 149. Any trust which utilizes this feature is therein substantially like a corporation and substantially unlike the traditional type of trust in which the postponement of the interest of some of the beneficiaries is not common. If found at all, it is likely to represent a remainder after a life or term interest, or, more rarely, an unsecured or residual interest after a secured or prior interest such as a seller's lien or an annuity.

8. Attributes of Legal Entity

An artificial personality, with the rights and liabilities of a separate legal entity, and a franchise or charter under general or special statute, are, of course, fundamentally and exclusively characteristic of corporations as known to the law of this country, since they could hardly exist in the case of any unincorporated association. The absence of these features may be dismissed as entirely without significance.

Some of the attributes of legal entity, however, such as the power to sue and be sued, are frequently conferred upon trusts of certain kinds by state statutes. This was true of the trusts which were before this Court in the case

of *Hecht* v. *Malley*, 265 U. S. 144. It was there pointed out not only that the Massachusetts trusts there involved employed many corporate forms and methods of procedure, but in addition that under the Massachusetts statutes, they were classified as "associations" and were subject to suit, attachment and execution as if they were corporations.

The opinion states (at page 147):

> "The Massachusetts statutes, however, recognize their existence, and impose upon them, as 'associations,' certain obligations and liabilities."
>
> "[Footnote:] 'By Chapter 441 of the Acts of 1909, the trustees of 'a voluntary association under a written instrument or declaration of trust the beneficial interest of which is divided into transferable certificates of participation or shares' are required to file copies of the instrument of trust with designated public officers and by chapter 18 of the Acts of 1916, such associations may be sued for debts, obligations, or liabilities and their property may be subjected to attachment and execution as if they were corporations. See 2 General Laws 1921, chap. 182."

Again (at page 161), the Court said:

> "We do not believe that it was intended that organizations of this character—described as 'associations' by the Massachusetts statutes and subject to duties and liabilities as such—should be exempt from the excise tax on the privilege of carrying on their business * * *."

Where an unincorporated group is recognized and controlled by statute, a most significant or even controlling resemblance exists which probably should require classification as an association.

9. *Details of Form or Procedure.*

It seems clear that many features which are frequently referred to as significant mean at most that when they are employed there is added ground for finding an "association," but when they are lacking the conclusion is to be affected very little if at all. Standing alone, no one of these features should have much weight; in connection with other elements they may become quite important.

Provision for a managing board is merely one method of accomplishing the formal organization which we consider essential but which may be otherwise provided. It will often involve the element of majority action which has a significance all its own, as above discussed.

Officers similar to those of corporations also evidence the employment of that much of the characteristic corporate form of organization and delegation of authority, but a true "association" could so readily employ other means for the same ends that the absence of such officers can not have much weight.

Meetings of trustees and of beneficiaries indicate a formality of organization which is important, but which probably may exist to the necessary extent without such meetings. Meetings of beneficiaries are chiefly significant in that they imply some control of the enterprise, as by the election of officers, or some element of majority rule. Informal contacts of beneficiaries suggest the participation which is characteristic of ordinary partnerships or joint ventures.

Records of group action are the corrollary of formal meetings. They add evidence of formal organization and operation, as does the practice of issuing reports to beneficiaries. Reports also suggest that the number of per-

sons interested is sufficiently large to produce a resemblance to a corporation.

A name and a seal are details of resemblance to a legal entity or personality, but a true trust commonly adopts a name for convenience, particularly if many business transactions are engaged in.

10. Limited Liability.

The aspect of limited liability has been much discussed upon a foundation of unwarranted assumptions and without recognition of the actual legal situation. Thus, the limited liability of shareholders, which is a most important corporate attribute, is often mentioned while it is ignored that one of the most important attributes of a true trust is that the beneficiaries incur no liability for the acts of the trustees. It is likewise ignored that one of the principal characteristics of a trust association, as distinguished from a true trust, is that the beneficiaries ordinarily incur an unlimited personal liability where an association exists. It is also assumed that a trust instrument can effectively relieve the trustees of an unlimited personal liability, although the law is clearly to the contrary.

(a) *Limited liability of the beneficial owners, although characteristic of corporations, is equally characteristic of trusts.*

Perhaps the limitation of liability of shareholders is the corporate characteristic which would, of all others, first suggest itself as peculiar to corporations. Traditionally, however, this has also been a fundamental characteristic of a trust.

That the beneficiaries of a trust are not personally liable for the acts of the trustees, in the absence of circumstances

which constitute an agency, a partnership, or some relationship other than a true trust, has been so thoroughly established over so long a period that nothing more should be necessary than to cite the following authorities:

Taylor v. *Mayo*, 110 U. S. 330, 334.
Everett v. *Drew*, 129 Mass. 150.
Schumann-Heink v. *Folsom*, 328 Ill. 321.
Dantzler v. *McInnis*, 151 Ala. 293, 44 So. 193.
Auxier v. *Aetna Insurance Co.*, 222 Ky. 243, 300 S. W. 617.
Bogert, Trusts and Trustees, p. 2123.
65 Corpus Juris, § 568, p. 703.

(b) Unlimited personal liability of the beneficial owners is characteristic of an "association".

On the other hand, the concept of a "trust association" was very largely developed in the litigation wherein it was established that the beneficiaries of a business trust operated under their control were individually liable as partners for the debts, contracts, and torts of the trustees. See:

Williams v. *Milton*, 215 Mass. 1.
Cook, Corporations, Eighth Edition, vol. III, pages 2247, 2248, 2251.
Weber Engine Company v. *Alter*, et al., 120 Kan. 557, 245 Pac. 143.

In *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110, in holding that a joint stock association, organized in the form of a trust, was an "association" under the income tax law, the Court pointed out (p. 111):

> "By the common law of Texas the partnership is not an entity, * * *; an association like the plaintiff is a partnership; its shareholders are individually liable for its debts as members of a partnership; * * *".

Also in *Durfee Mineral Co.*, 7 B. T. A. 231, there was held to be an association notwithstanding the fact that the beneficiaries were subject to unlimited liabilities as partners. On the other hand, in *Wolf*, 10 B. T. A. 835, there was held to be no association even though all the beneficiaries of the trust were expressly made "jointly and severally responsible" for all liabilities incurred by the trustees, and were expressly given "the rights and obligations of partners." To the same effect is *McGlone*, 22 B. T. A. 358.

(c) Unlimited personal liability of the trustees is characteristic of a trust, whether or not an "association".

It seems to be very commonly assumed that a trust resembles a corporation when the trust instrument provides that the trustees shall not incur any personal liability. This, however, disregards the well established rule of law that a trustee, even when he designates himself as such, incurs a personal liability which can be avoided only by specific stipulation in the contract and not by general provisions in the trust instrument.

Taylor v. *Mayo*, 110 U. S. 330, 334.
Allegheny Tank Car Co. v. *Culbertson*, U. S. Dist. Ct., Texas, 288 Fed. 406.
Austin v. *Parker*, 317 Ill. 348, 148 N. E. 19.
Schumann-Heink v. *Folsom*, 328 Ill. 321.
26 Ruling Case Law, § 175, pp. 1316-1317.
65 Corpus Juris, § 569, pp. 703-704.

In holding that an attempted limitation of liability in a trust instrument failed to save the trustees from personal liability, the Supreme Court of Kansas, in *Linn* v. *Houston*, et al., 123 Kan. 409, 255 Pac. 1105, said in part:

"* * * a common-law trust certainly has none of the attributes of limited liability or freedom from personal

liability which attach to limited partnerships and ordinary corporate organizations. Freedom from personal responsibility for breach of their business contracts is not a matter which a group of men can confer upon themselves by the creation of a trust, without the sanction of a statute to that effect, or without the intelligent contractual consent of the parties with whom they deal."

11. Continuity.

A continuing succession, irrespective of the identity of the component members, is frequently mentioned as distinctive of the corporate form or organization. However, except as it relates to separate legal personality, it is nothing more than or different from the continuity which is characteristic of any trust, regardless of changes in the identity of the trustees or of the beneficiaries.

12. Transferability of interest; issue of certificates.

The transferability of membership and beneficial interest is to some extent a corollary of a continuing succession. It is by no means essential to corporate form, since there is no transferable membership in the case of many corporations of such character as chartered colleges, hospitals, scientific and literary societies, and other public or private institutions which are unquestionably corporations. See *Sears, Roebuck & Co., etc.* v. *Commissioner*, C. C. A. 7, 45 Fed. (2d) 506, 508. On the other hand, the transferability of the interest of the beneficiary of a trust is an essential characteristic of the true trust. This is recognized by counsel for the Government in the brief filed in the *Morrissey* case (page 22). See also the following decisions:

Commissioner v. *Field*, C. C. A. 2, 42 Fed. (2d) 820, 822.

Edward T. Blair, 31 B. T. A. 1192.

65 Corpus Juris, § 303, pp. 546-550.

The issue of transferable certificates of beneficial interest clearly is not significant except as it reflects the size and formality of the organization and procedure. To furnish a written acknowledgment of the liability of the trustees and an evidence of the interests of the beneficiaries is a natural and common practice in all kinds of trusts, as well as in syndicates and many other forms of group activity. Of itself, therefore, this is not in any degree a corporate characteristic.

In *Trust No. 5833, Security-First National Bank, etc.* v. *Welch,* 50 Fed. (2d) 613, aff'd by C. C. A. 9, 54 Fed. (2d) 323, certiorari denied, 286 U. S. 544, holding that an "association" existed because of other corporate characteristics, the District Court said:

> "It is immaterial as to whether the shares or interests in the project are evidenced by certificates of stock or by any other written evidences of ownership. The beneficial interest of the beneficiaries in this trust clearly existed and was assignable and transferable as other personal property."

(2) The Lake View Land Association Had No Essential Resemblance to a Corporation and Was Not an "Association."

Whatever may be determined as to the formulation of a general rule or the establishment of specific tests for the distinction between an association and a true trust, it seems hardly possible that the classification of the Lake View Land Association as a corporation under the taxing statute can be sustained.

In all essential respects, this so-called association was merely an arrangement for the convenient holding of the title to a single parcel of real estate, such as is commonly employed for real estate held in connection with an individual or partnership business or by an individual investor in real estate. The income-producing activities of this enterprise (which must obviously be of primary significance in the determination of classification for income tax liability) were no different in any essential feature of method or form from those of a typical joint venture. The provisions of the trust instrument defining the powers, authorities, and obligations of the trustees lose most of their significance in view of the fact that the owners of the property were themselves trustees and that all their functions as trustees were performed exactly as if the title had been held merely in a simple tenancy in common. The terms of the trust instrument were significant only to give legal validity to the leases and other acts of the owners in the operation of the property.

Even the assignment of the beneficial ownership to the wives of the trustees and the changes which occurred in the identity of the trustees are not at all inconsistent with this point of view. The title being held by the trustees,

the changes which occurred took the form which was indicated and required by the existing situation. Had there been a mere joint ownership, there would have been a transfer of the interests in the land instead of an assignment of th interests in the trust, and there would have been an appointment of a managing agent instead of a designation of successor trustees. These differences are clearly differences merely in legal formalities and do not in any substantial way affect the ownership or operation of the property.

(a) The Lake View Land Association was not engaged in carrying on a business, but was a mere convenience for holding the title to real estate owned by two individuals as an investment.

Even if the Government is correct in its contention (which has been denied above, pages 12-18), "that the 'doing business' test which is emphasized by many decisions is the single criterion" of classification in a case of this kind (*Morrissey* brief, pp. 6, 13), or that "either the business test must be considered conclusive in itself or conclusive where there are some or all of the elements of centralized control, limited liability, and continuity of the business regardless of death or transfers of interest" (*Morrissey* brief, page 21), still the Lake View Land Association should not be taxed as an association because it was not engaged in carrying on a business, within the propet scope of that term as applied for this purpose.

The single property held by this trust was of the character which is commonly purchased and held for investment by individuals, who employ agents to attend to the details of management. The trustees were not dealing in real estate, never having acquired or negotiated for the

purchase of any other real estate (R. 28, 29). They merely held this particular property, which was specifically described in the trust agreement (R. 19). It does not appear that either the original owners or their wives were engaged in the business of operating apartment buildings, or that they held this property otherwise than as an income producing investment, and, as to one of them, as a place of residence (R. 28). Although Swanson was engaged in the business of a real estate broker and managing agent, this is quite different from the business of purchasing, operating, and selling real estate as a principal. For more than a year before the trust was created, the property was held in the name of Swanson, on behalf of himself and Otis. In this situation, surely no one would contend that a taxable "association" existed. The trust was organized at the suggestion of their attorney (R. 27), for reasons which related entirely to the handling of the title to the property. The change did not affect the operation of the enterprise and should have no effect upon the taxation of the income.

The description of the Iowa-Burk Syndicate, held not an "association" in *Commissioner* v. *Duckwitz*, C. C. A. 7, 68 Fed. (2d) 629, by the same court which held that the Lake View Land Association was an "association," could be applied almost verbatim to the Lake View Land Association, and the Court has furnished no explanation for the contradiction in the results. In the language of the opinion in the *Duckwitz* case, describing the former trust, we have interpolated the changes necessary to apply to the Lake View Land Association, as follows:

> "If we read the evidence and the trust agreement together it seems tolerably plain therefrom that a small group of people in Charles City, Iowa, [*two men in Chicago*] planned a simple and inexpensive method of handling a small venture in Texas oil speculation [*an apartment house investment in Chicago*].

"A single tract of ten acres [*lot and building*] was the field of their operation. Nowhere was there a suggestion that the trustees or members contemplated any oil mining [*real estate investment*] activities outside of this tract. Those who conceived the project planned that this local group, who were willing to back their hopes with a contribution sufficient to drill an oil well [*purchase the property*], should divide the profits [*income*]. The contributions of each were so small that a conveyance of a fractional interest in the real estate would have been cumbersome and impractical. [*Their attorney advised them against carrying the title in their individual names.*]"

The distinction between mere investment, or the holding of investment property, and the active employment of capital in a business has been recognized in the Regulations of the Treasury Department and has been pointed out in many decisions involving this question.

For example, in *Gardiner* v. *United States,* 49 Fed. (2d) 992, the Circuit Court of Appeals for the First Circuit said (pages 995, 996):

"These two trustees have no business office; they hold no formal meetings; they merely consult with each other; they have hired no officers, employed no agents to procure subscriptions to the capital of their trust; they have sold one parcel of real estate and bought another, otherwise their real estate holdings are as originally; they have so arranged their leases as not to require them to run heating plants, or even provide janitor or elevator service. In sum their actual performance is indistinguishable from that of ordinary testamentary trustees."

The same court, in the case of *Lansdowne Realty Trust* v. *Commissioner*, C. C. A. 1, 50 Fed. (2d) 56, has also said that the holding of property which had been leased for a term of five years was "not doing business in any sense" but was "nothing more than trustees ordinarily would be called upon to perform in the management of trust property."

In *Dunbar*, et al. v. *Commissioner*, C. C. A. 1, 65 Fed. (2d) 447, the concurring opinion of Morton, J. states:

> "The commercial management of property whether real or personal, for income or profit, seems to me engaging in business. These views were, however, on the most careful consideration, disapproved by this court in *Gardiner* v. *United States*, 49 F. (2d) 992, which covers the present case."

As to the character and extent of its business operations, the Lake View Land Association was obviously much less engaged in the conduct of a business than were the enterprises which have been held taxable as trusts in several other cases, including decisions of the Circuit Court of Appeals for the Seventh Circuit as well as those in other Circuits, including the case of *Coleman-Gilbert Associates* which is now pending before this Court.

Certainly, if it is held that no business was being carried on by the Coleman-Gilbert Associates, the same would be true of the Lake View Land Association, of which the operations were much less extensive and continuous. The Circuit Court of Appeals for the First Circuit, however, has given very little weight to the conduct of a business, as shown by its decision in *Commissioner* v. *Kelley*, 74 Fed. (2d) 71.

In *Commissioner* v. *Guitar Trust Estate*, 72 Fed. (2d) 544, the Circuit Court of Appeals for the Fifth Circuit

sustained the Board of Tax Appeals in holding that a trust was not an association although it managed large tracts of real estate and much personal property and carried on a ranching business, a cotton business, and a cotton seed business. Trusts and syndicates for the development and operation of oil properties have been held not to be associations by the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Combs*, 76 Fed. (2d) 682, now pending before this Court and to be argued with this case, and by the Circuit Court of Appeals for the Tenth Circuit in *Commissioner* v. *Brouillard*, 70 Fed. (2d) 154, certiorari denied, under title of *Helvering* v. *Pryor & Lockhart Development Co.*, 293 U. S. 574.

In four cases, the Circuit Court of Appeals for the Seventh Circuit has held that a trust was not an association, notwithstanding business activities which in at least three cases were no less extensive or continuous than in the present case. *Commissioner* v. *Morriss Realty Company Trust*, 68 Fed. (2d) 648, concerned a family real estate trust which subdivided tracts of land, including some which it purchased, sold lots on installments, erected houses and sold them on time contracts, and borrowed money on mortgages for such operations. A large office building, operated by a managing agent, was owned by the trust involved in *Commissioner* v. *McCormick*, 68 Fed. (2d) 653. The oil venture involved in *Commissioner* v. *Duckwitz*, 68 Fed. (2d) 629, has already been mentioned.

The Zenith Real Estate Trust, held not an association in *Tyson* v. *Commissioner*, C. C. A. 7, 54 Fed. (2d) 29, was very similar to the Lake View Land Association, except that the Zenith Trust had only one long-term net lease with a single tenant, instead of a number of shorter leases as in the present case. A distinction on this ground, however, would fail to recognize that even under long-term leases

defaults and forfeitures occur, as demonstrated by the common experience in recent years, adjustments of rentals and modifications of other terms must be negotiated, buildings become obsolete and their replacement must be considered, opportunities to sell the properties arise, and other problems of supervision and management must frequently be met. In the case of the Zenith Real Estate Trust itself, it appears that the trustees found it necessary to engage a local agent to see that the taxes were paid, that the building was kept in repair, and that the other covenants of the lease were complied with. The trustees also sold the property prior to the expiration of the lease.

Such activities, and those which are required of any trust which holds income-producing real estate, differ only in minor degree from those which are here involved, where the trustees merely held title to the property while the two actual owners directed its management by their professional agents. From the point of view of the beneficiaries and trustees of the Lake View Land Association, just as the Court said of the Zenith Real Estate Trust, this was simply an investment in real estate which was expected to provide "with reasonable certainty for a sure and fixed income without either care or supervision."

(b) The Lake View Land Association had none of the characteristics of the corporate form of organization or mode of operation.

The simplicity of the organization and procedure of the present trust is so entirely unlike the characteristic forms and procedure of corporations that it is difficult to make a detailed comparison. The provisions of the trust agreement (R. 19-26) are much more like the familiar clauses of the documents governing ordinary real estate trusts than

like the terms of the charters or by-laws which control the operations of corporations, and which provide for meetings, majority rule, elections, powers of officers, managing boards, and other characteristic features of corporate organization.

Referring to the enumeration of corporate characteristics which has been given above (page 22), it will be seen that almost none of them was present in this case.

This was, of course, a voluntary association, but it had no semblance of formality or structure of organization and, as has been argued, it was not engaged in the conduct of a business.

As contrasted with the control over a corporation by the stockholders, the beneficiaries of the Lake View Land Association had no voice in the selection of the trustees, who were entirely self-perpetuating (paragraph 10 of the Trust Agreement, R. 24), and the trustees were given absolute and unrestricted control over the affairs of the trust (paragraphs 3 and 4 of the Trust Agreement, R. 19-21). More significant, perhaps, is the fact that the owners of the property made themselves trustees and one of them managed the enterprise for the benefit of his associate and their wives, just as would have been done if the parties had held the legal title in common instead of owning merely the beneficial interest.

The instrument governing the Lake View Land Association contains no provision under which any majority of the beneficiaries were authorized to take any action which would in any respect bind all of the beneficiaries as a class (except that upon the single matter of amendment of the trust agreement, it was provided (in paragraph 13 of the Trust Agreement, R. 26) that the agreement of beneficiaries holding three-quarters or more of the receipts

issued should be binding upon all of the beneficiaries and also upon the trustees). In this respect, this trust is therefore strikingly familiar to the ordinary and typical trust, and dissimilar from corporations, joint stock companies, and analogous associations.

This enterprise does not present the principal economic characteristic of a corporation, in that it did not involve the aggregation of a large amount of capital contributed by a large number of investors. On the contrary, it was essentially a personal investment, in which only two friends and associates joined. There were no preferences or priorities among the owners.

Instead of the characteristic authority to accumulate a surplus and to make discretionary distribution of income, the trustees of the Lake View Land Association were required to divide the net income semi-annually or oftener (paragraph 6 of the Trust Agreement, R. 22).

The trust had no aspects of legal entity or personality, and was not the subject of any special recognition or control by state statute.

The activities of the trustees of the Lake View Land Association certainly resembled as little as possible the typical activities of a board of corporate directors. The absence of any formal meetings or records of meetings and of any reports to the beneficiaries (except those given by informal conversation) is much more like the traditional trust or joint venture than the traditional corporation.

In common with all true trusts, the beneficiaries of the Lake View Land Association were not personally liable for obligations incurred by the trustees, but the trustees were subject to unlimited personal liability, under the authorities previously cited. The trust also had continuity of

succession and the interests of the beneficiaries were transferable, as would be true of any trust.

In no essential respect, did this trust employ any of the characteristic forms of organization or modes of procedure which would be required to justify classifying it as an "association."

Conclusion.

It was obviously the purpose and intention of Congress that the tax burdens imposed upon business corporations should likewise be shared by those unincorporated enterprises which were essentially similar to a corporation in form of organization and mode of operation. The attitude of the Supreme Court in *Hecht* v. *Malley* and in *Burk-Waggoner Oil Association* v. *Hopkins*, is completely in accord with this legislative purpose, but it has been ignored and defeated by the Circuit Court of Appeals for the Seventh Circuit in the present case. A trust which has no substantial resemblance to a corporation in form of organization or in method of operation has been subjected to the corporate tax. That decision should therefore be reversed by this court.

Respectfully submitted,

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Attorney for Petitioners.

KIXMILLER, BAAR & MORRIS,
11 South LaSalle Street,

Chicago, Illinois, November 1, 1935.

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No. 108

In the Supreme Court of the United States

OCTOBER TERM, 1935

JOSEPH E. SWANSON ET AL., TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 108

JOSEPH E. SWANSON ET AL., TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

The question presented is whether the Lake View Land Association is to be taxed as an association or as a trust.

The Lake View Land Association was created under a trust agreement, whereby a three-story apartment building was transferred to three trustees. The trustees were given exclusive power to manage and control the property; to exchange any or all of the real estate for any other property; to

erect, tear down, alter, reconstruct, or improve at their discretion; to borrow money and to secure its payment by mortgage on the property; and to sell all or any portion of the property. They were also given the right to hire suitable offices and to employ such agents for the transaction of the business of the trust as they might deem advisable. The trust was to expire twenty years after the death of the last survivor of several named persons, or might be earlier terminated by the trustees selling all of the property and distributing the net proceeds. One thousand shares of a par value of $100 each were issued, on which it was specifically provided that such receipts were evidences of the ownership of personal property and not real estate. Shares were transferable by assignment, by the surrender of the receipt, and a notice of such assignment was required to be kept on the written register of the names and addresses of the holders of such receipts. The agreement could be amended at any time by three-fourths of the registered beneficiaries.

The court below held, correctly, we submit, that the Lake View Land Association was a corporation in everything but the name and seal and the fact that its business was carried on without holding formal meetings, adopting resolutions, and keeping minutes.

However, in view of the fact that the Government applied for certiorari in the case of *Helvering* v. *Coleman-Gilbert Associates*, Nos. 78–79, alleging a

substantial conflict between that and the instant case, we do not feel warranted in opposing the petition. However, if the petition in Nos. 78–79 be denied, we respectfully submit that the petition in the instant case should also be denied.

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JULY 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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JOSEPH E. SWANSON ET AL., TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 19–30) is unreported. The opinion of the Circuit Court of Appeals (R 44–46) is reported in 76 F. (2d) 651.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 10, 1935. (R. 47.) A petition for a writ of certiorari was filed June 7, 1935, and was granted October 14, 1935. (R. 50.) The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trust involved is an association within the meaning of Section 2 (a) (2) of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> Sec. 2 (a) When used in this Act—
>
> * * * * *
>
> (2) The term "corporation" includes associations, joint-stock companies, and insurance companies. * * *.

Regulations 69:

> Art. 1502. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has

ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 2.

Art. 1504. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341–347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute.

STATEMENT

The facts are not in dispute and, as found by the Board of Tax Appeals, may be summarized as follows:

In 1914, Joseph E. Swanson and Ralph C. Otis acquired a plot of vacant ground in the City of Chicago, which was later designated as No. 3122 Sheridan Road, for the purpose of erecting an apartment house on it. Swanson took title. (R. 26.) Originally 135 feet were purchased for $27,000, but Swanson and Otis sold 50 feet for $17,500 before they started to build on it. (R. 26.)

A three-story apartment building, containing apartments of seven, eight and eleven rooms, was erected on the tract, being completed on May 1, 1914. Swanson and Otis contributed equal amounts to the cost of construction, their total contributions amounting to no more than $30,000 and a mortgage loan of $75,000 was secured to complete the financing. (R. 26.)

At the suggestion of their attorney, on June 1, 1915, they created a trust known as the Lake View Land Association, as a safer way to carry the title. (R. 27.) The trust agreement provided that Swanson, Otis, and Allen G. Mills, all of Illinois, should acquire title to the above-described property and should hold it in trust with power to manage the real estate and improvements, collect the income therefrom and pay the taxes and other expenses. (R. 19–20.)

The trustees were given authority to lease the real estate, or buildings, or any part of them, for any period not to exceed 198 years, to tear down the buildings and erect new ones, to mortgage the property up to 60 percent of its value, to sell the property, or to exchange it for other property and, in general, to do any acts deemed advisable in connection with the trust. (R. 20–21.) Article 4 provided, in substance, that the trustees were not to be prohibited from having transactions with a corporation or trust in which one of them might be an officer or director. (R. 21.) Their compensation for their services was to be fixed as they might determine, provided that it should not exceed 2½% of the gross income of the trust. (R. 21–22.) Neither the trustees nor the beneficiaries were to be personally liable for any obligation of the trust. All persons dealing with the trustees were to look only to trust property for payment. (R. 22.) The trustees were directed to distribute the net income of the trust, semiannually or oftener, in their discretion, according to the respective beneficial interests, and were to render annual statements to any beneficiaries requesting them. (R. 22.)

The interests of the beneficiaries were to be represented by shares or receipts, of a par value of $100 each, aggregating at the beginning $100,000. These shares were stated to be personal property. A register of transfers of interests was to be kept.

(R. 22–23.) Any beneficiary desiring to dispose of his shares was required first to offer them to the other beneficiaries, but if none desired to purchase, he could, after thirty days, dispose of them to outsiders, in which case the assignment was to be given to the trustees and new shares issued. (R. 23–24.) Any vacancy among the trustees was to be filled by the remaining trustees (R. 24–25).

The trust was to terminate at the expiration of twenty years after the death of the last survivor of James Otis, Ralph Chester Otis and Sarane Otis and Florence Otis, children of Ralph C. Otis, and Joseph B. Swanson and Ralph E. Swanson, children of Joseph E. Swanson. However, if the trustees should so decide, they might sell all of the property belonging to the trust and terminate it prior to that time. (R. 25.)

The trust agreement was subject to amendment by an agreement in writing of registered beneficiaries holding three quarters or more in value of the receipts, provided that no third persons should be bound by an amendment until it was recorded in the office of the Recorder of Deeds, Cook County, Illinois. (R. 26.)

Upon the organization of the trust, Otis and Swanson each received 500 shares of beneficial interest. In 1917 and 1920, Otis and Swanson transferred their interests to their wives and they were the only beneficiaries during 1925 and 1926. (R. 27.) About 1926, James Otis, the son of Ralph C. Otis, succeeded his father as trustee. (R. 27.)

Between 1915 and 1932, Swanson was a partner in Willoughby & Company, which was engaged in the business of buying and selling real estate as a broker and also in managing properties, including the Lake View Land Association property. Willoughby & Company negotiated the original leases, which were at first for terms of from three to five years, but later varied. It attended to redecorating, purchasing of coal and all matters pertaining to service and condition of the building. (R. 27.) Swanson and Otis, the latter having an office with Willoughby & Company, though not a member of that firm, directed the management of the property and frequently discussed matters pertaining to the operation of the building. The entire control of the Association was in their hands. (R. 27–28.)

The three trustees as such did not assemble in formal meetings. They never adopted resolutions, kept a minute book, adopted bylaws, or chose officers or a board of directors. The beneficiaries never acted by vote on any matter. (R. 28.)

Several large buildings and apartment houses were constructed near the apartment of the Association. After it was built land in the vicinity increased materially in value, the gross rents of the apartment of the Association increased from $21,000 to $28,000 (in 1926) and operating expenses doubled. (R. 28–29.) The Association had a chance to sell the property for as much as $1,500 a front foot between 1925 and 1929, but did not do so,

as it planned to erect a larger building on the site at some time. The Association never acquired any other real estate. (R. 28, 29.)

The Commissioner held that the Lake View Land Association was taxable as an association and not as a trust and determined deficiencies for 1925 and 1926, based on that and other adjustments not here involved. The Board sustained the action of the Commissioner on the Association issue, and determined deficiencies of $1,535.27 and $1,157.57 for 1925 and 1926, respectively. (R. 30, 31.) The Circuit Court of Appeals sustained the Commissioner's determination.

ARGUMENT

The sole question in this case is whether the trust involved is an association within the meaning of Section 2 (a) (2) of the Revenue Act of 1926.

The same general question is involved in *T. A. Morrissey and James M. O'Brien, Trustees of an express trust, known as the Western Avenue Golf Club* v. *Helvering*, No. 17, October Term, 1935, which has already been argued; in *Helvering* v. *Coleman-Gilbert Associates*, Nos. 78 and 79, October Term, 1935, and in *Helvering* v. *E. E. Combs and Edward Everett, Trustees of E. E. Combs Well No. 2 Express Trust*, No. 238, October Term, 1935. We think that no useful purpose will be served by repeating herein the arguments made in the Government's briefs in the first two of those cases, which we incorporate herein by reference.

Our position is that a trust which is doing business is an association within the meaning of the statute, regardless of whether it employs a seal, by-laws, formal meetings of the trustees analogous to directors' meetings and other devices of a corporation.

The Board made no direct finding that the Lake View Land Association was doing business, but held that it was an association on the authority of the previous decision in *Swanson* v. *Commissioner*, 29 B. T. A. 1123, a similar trust created by Swanson. A reference to that decision removes all doubt that the Board considered that the Lake View Land Association was doing business and that was the view of the court below.

It is clear that the Association was created to operate, for profit, the apartment building, or any other building which might subsequently be erected on the same land. There is no suggestion in the trust agreement that the purpose of the trust was to provide a means of holding the property for a short time until it could be sold, so there is no basis for the argument that the Association was a mere liquidating trust. Such an argument is also refuted by the fact that profitable offers to purchase the property were refused, and that up to 1930 the trustees contemplated the erection of a larger building on the same land.

The Association carried out the purpose for which it was organized; that is, it operated the apartment for profit.

That the management of an apartment house or other rental building for profit constitutes doing business is settled by *Hecht* v. *Malley*, 265 U. S. 144, and *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. See also authorities cited in the brief in the *Coleman-Gilbert Associates* case, *supra*, pp. 10–14. The only distinction between the *Coleman-Gilbert Associates* case and this one, in so far as the doing business test is concerned, is that there the trust was managing several apartment houses, while here it was managing one. We think that the management of one as well as that of many constitutes doing business, when the trust was created for that purpose.

In *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, involving the excise tax imposed on corporations doing business, this Court said (p. 455):

> It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption "*when not engaged in business*" ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.[1]

For reasons stated in the briefs in the *Morrissey* case and the *Coleman-Gilbert Associates* case, we

[1] We think it unnecessary to discuss at length the suggestion that the fact that Willoughby & Company handled some of the details of the business is important. The business which was transacted was the Association's business and it

believe that the satisfaction of the doing business test should be regarded as conclusive. The petitioners' brief in this case shows how difficult it is to rely upon any other test, for they enumerate a long list of respects in which a trust should resemble a corporation in order to be classified as an association and then confess that some of these are merely negatively essential, others are very or slightly significant, if present but not if absent, and others have no significance. (Br. 22–37.)

The three elements which the petitioners insist upon most strongly, however, are the voluntary nature of the association, at least the minimum of formal organization and business activity. Inasmuch as there is no doubt but that this trust was a voluntary trust, we may dispose of that point without discussing it, although we do not agree that it is essential for the trust to be created by voluntary agreement by the beneficiaries.

We have shown above that there was business activity, so that the only one of three suggested characteristics not disposed of is that of a "minimum of formal organization".

For reasons stated in the *Morrissey* and *Coleman-Gilbert Associates* briefs, we do not think that the presence or absence of formalities, such as trustees meetings, beneficiaries meetings, minutes of meetings, is at all important. Such devices are

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was engaged in business for profit, whether or not the trustees employed an agent. See *Investment Trust of Mutual Investment Co.* v. *Commissioner*, 71 F. (2d) 1009 (C. C. A. 2d), affirming *per curiam* 27 B. T. A. 1322.

often disregarded in close family corporations and are not the attributes which give a corporation in business an advantage over an individual conducting the same business.

The characteristics which do give a corporation an advantage over an individual conducting a similar business are pointed out in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, as follows (p. 162):

> The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships.

All of the elements mentioned as characteristic of a corporation are present in this case. We readily concede that they are usually present in most, though not all, trusts. In fact, that is one of the reasons for our position that the doing business test should be the only test required.

But there can be no question that all three elements existed here. There was no individual liability because the trust instrument specifically provided that neither the trustees nor the beneficiaries should be liable and that creditors should look only to the trust funds for payment of trust

obligations.[2] The trust had continuity regardless of the death of a beneficiary, or of changes in the beneficial interests, which were transferable. Its affairs were managed by trustees who could act as effectively for the trust as can a board of directors for a corporation.

We submit, however, that even under the petitioners' theory that a trust should not be held to be an association without a minimum of formal organization, this trust should be classified as an association. The trust had transferable receipts or certificates analogous to shares of stock, of which a register was kept. These certificates had a par value of $100 a share. Clearly, such certificates provide a minimum of corporate form and are more significant than such things as formal meetings of the trustees, or by-laws. See *Tyson* v. *Commissioner,* 68 F. (2d) 584 (C. C. A. 7th), certiorari denied, 292 U. S. 657. It also had a trade name, the Lake View Land Association.

The petitioners also attach some importance to beneficiary control, although in *Hecht* v. *Malley, supra,* it was held that a trust could be an association, regardless of beneficiary control, if it was doing business. For that and other reasons stated in the Government's brief in the *Morrissey* case, *supra,* and the *Coleman-Gilbert Associates* case,

[2] The trust directed the trustees to incorporate a provision to that effect in every contract, so that there could be no question of a limitation of the liability of the trustees under Illinois decisions. *Schumann-Heink* v. *Folsom,* 328 Ill. 321.

supra, we think that the matter of beneficiary control is no longer important. However, we point out that the beneficiaries in this case were not wholly without control, since by a three-fourths vote they could amend the trust instrument.

CONCLUSION

The decision of the court below holding that the trust was an association should be affirmed.

Respectfully submitted.

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NOVEMBER 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

SUPREME COURT OF THE UNITED STATES.

No. 108.—October Term, 1935.

Joseph E. Swanson et al., as Trustees of the Lake View Land Association, Petitioners,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 16, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question presented is whether the income of the "Lake View Land Association" for the years 1925 and 1926 was subject to tax as the income of a trust under section 219 of the Revenue Act of 1926,[1] or as the income of an "association" by virtue of section 2(a)(2) of that Act.[2] The Circuit Court of Appeals held the taxpayer to be an "association" and affirmed the decision of the Board of Tax Appeals to that effect. 76 F. (2d) 651. This Court granted a writ of certiorari. See *Morrissey* v. *Commissioner*, decided this day.

The material facts as found by the Board of Tax Appeals are as follows: Joseph E. Swanson and Ralph C. Otis, in 1914, acquired a piece of vacant land in the city of Chicago with the view of improving it by the erection of an apartment house, the title being taken by Swanson. An apartment house was built. Subsequently, in 1915, at the suggestion of their attorney, they entered into a trust agreement for the purpose of carrying the title to the property. The trust was designated as the "Lake View Land Association". The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. Petitioners set forth the following summary of the trust agreement,—taken from the opinion of the Circuit Court of Appeals:

"Under the trust agreement, the trustees were given the complete management and control of the property, to exchange, reconstruct, remodel, sell, or improve at their discretion or to borrow money secured by the property. They were authorized to rent

[1] 44 Stat. 32.
[2] 44 Stat. 9.

suitable quarters for the transaction of the business of the trust and employ such assistants as they required. The agreement provided for the issuance of 'receipts' to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued;[3] that neither the trustees nor the beneficiaries should be personally liable, and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expiration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary".

The Court of Appeals also stated that "The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the affairs of the property, kept no minute book, had no by-laws. They elected no officers and no so-called board of directors".

The compensation of the trustees was to be fixed by themselves but was not to exceed 2½ percent of the gross income of the trust. After making provision for the payment of outstanding claims, the net income was to be divided among the beneficiaries according to their interests, and on the request of any beneficiary the trustees were to render annual accounts. The trust agreement also made provision for a written registry of beneficiaries, who could transfer their interests in a described manner, after having first offered them to the other beneficiaries.

The renting of apartments, the details of managemnt and the distribution of net income, were committed to a firm (of which Joseph E. Swanson was a member) engaged in the business of buying and selling real estate and managing properties. That firm acted under the direction of Ralph C. Otis and Joseph E. Swanson and the "entire affairs of the Lake View Land Association" were at all times in their hands.

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[3] Petitioners submit that this provision of the agreement should, under the law of Illinois, be taken to imply that the trustees could sue and be sued as individuals, and not "the trust as an entity".

Applying the governing principles, as set forth in our opinion in *Morrissey* v. *Commissioner, supra*, we agree with the Court of Appeals that the trust constituted an association and was taxable as such. The limited number of actual beneficiaries did not alter the nature and purpose of the common undertaking. Nor did the fact that the operations of the association did not extend beyond the real property first acquired change the quality of that undertaking.

The judgment is affirmed.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.